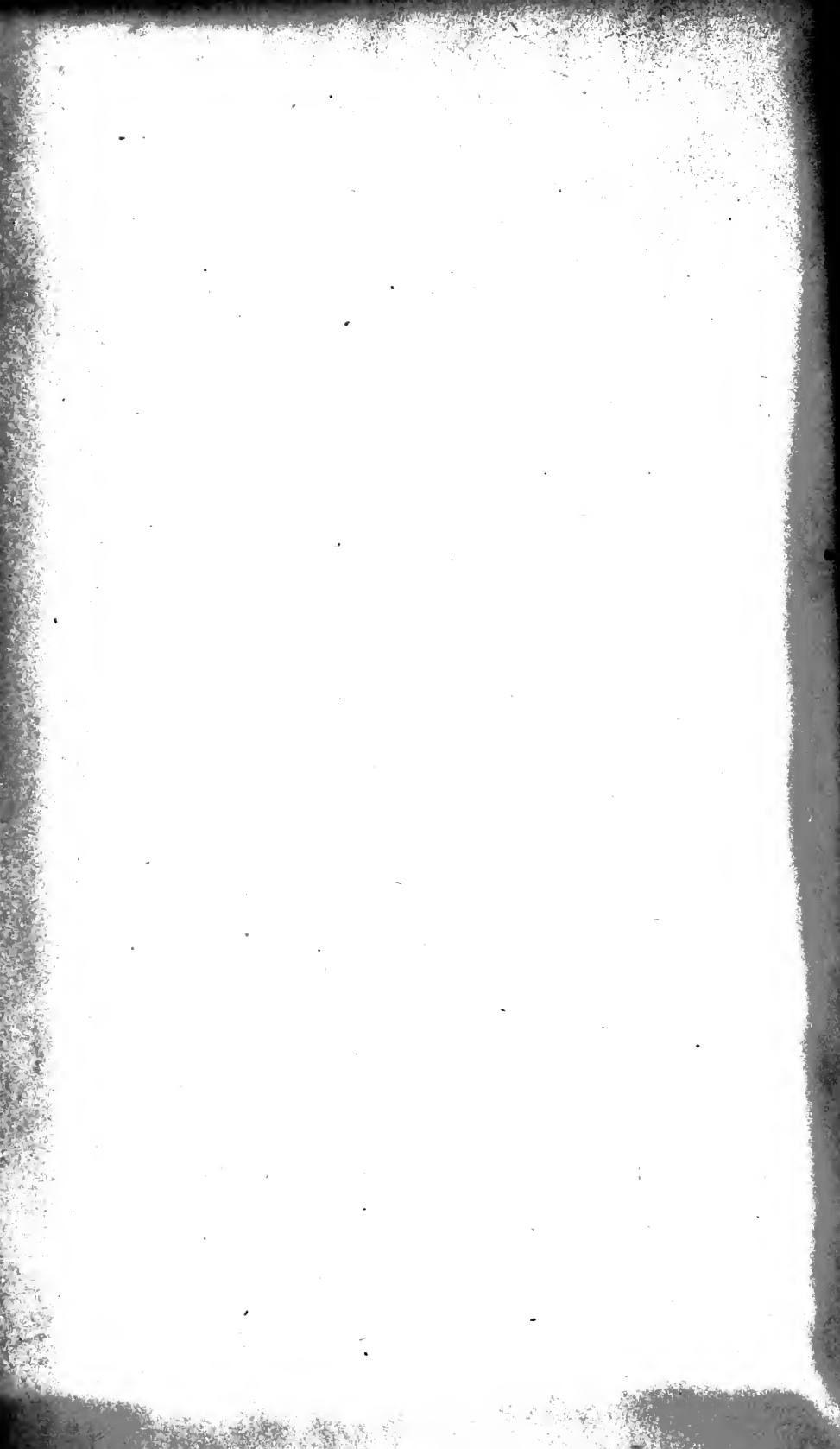
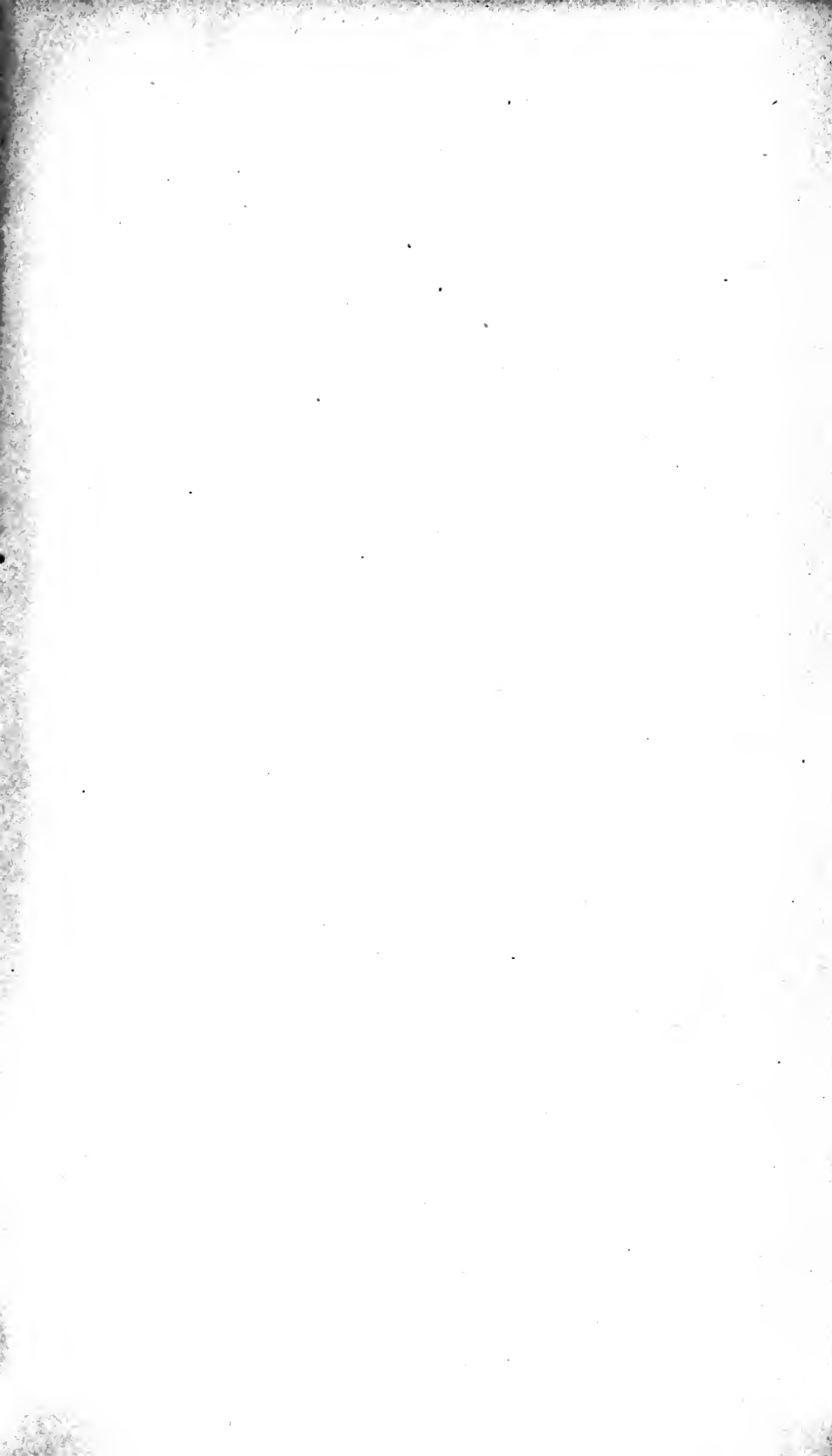
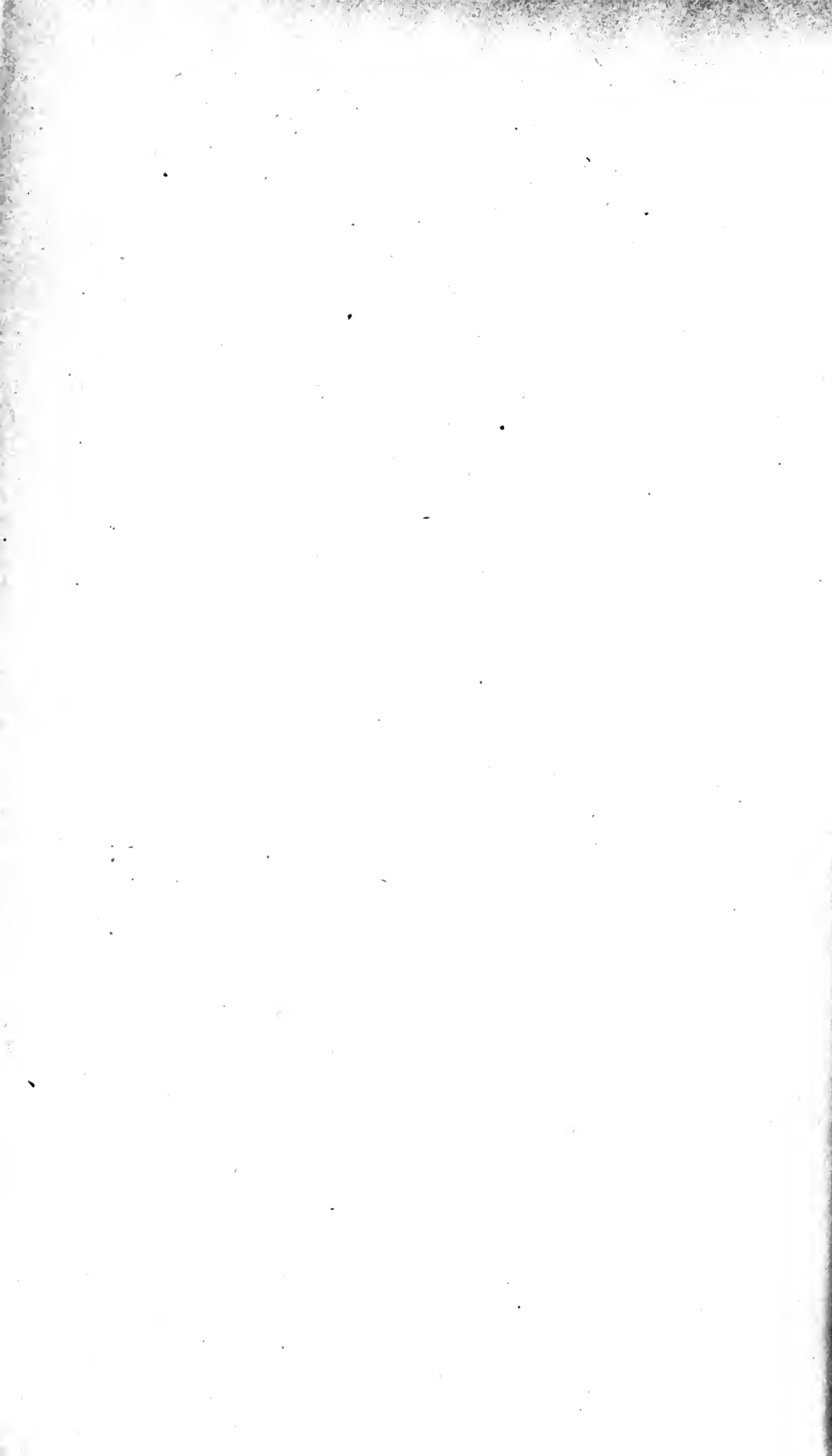


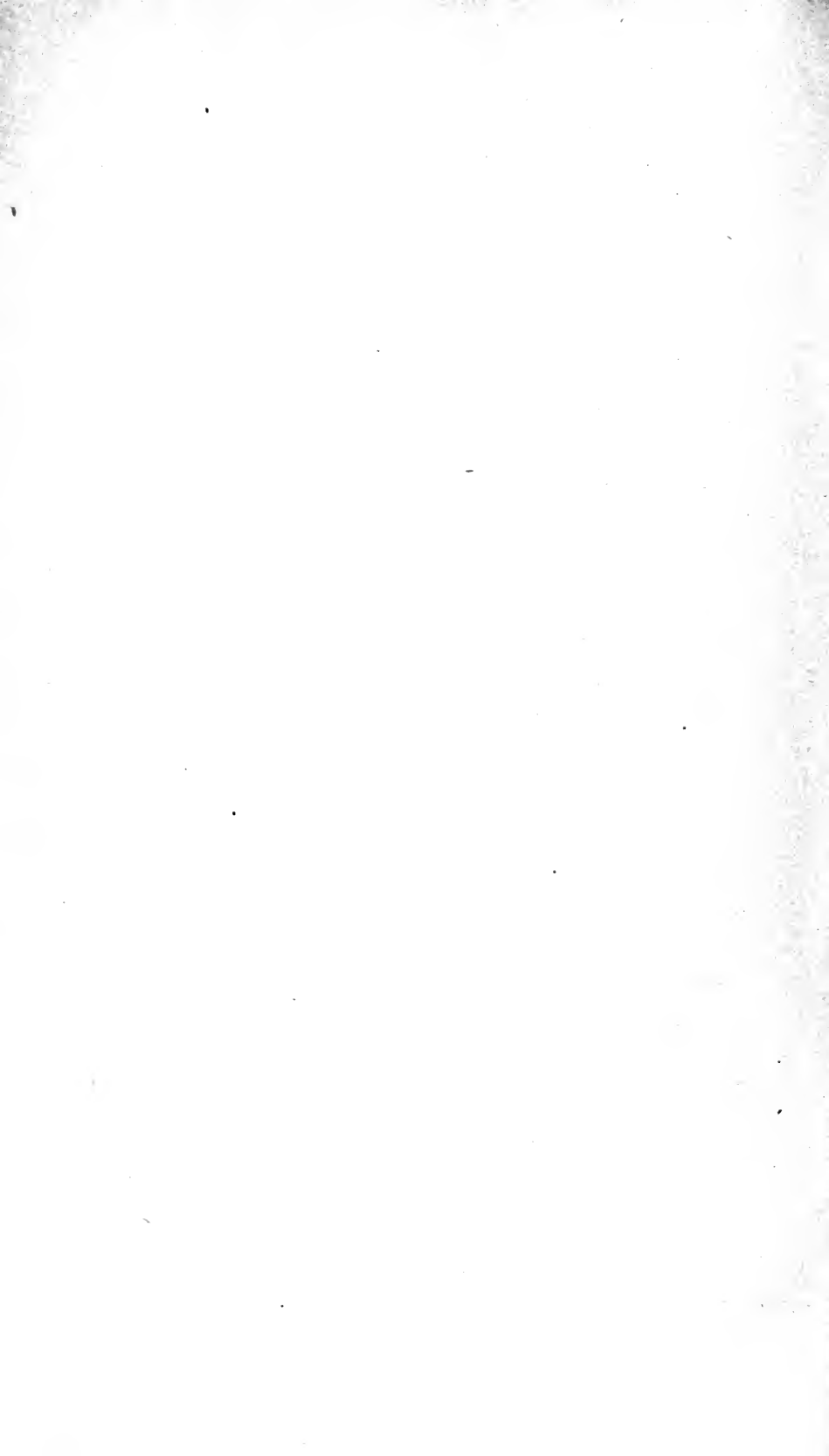


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AMERICAN CONSTITUTIONAL LAW.

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AMERICAN  
CONSTITUTIONAL LAW.

BY

J. I. CLARK HARE, LL.D.

IN TWO VOLUMES.

VOL. I.

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## P R E F A C E .

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IF an apology is needed for the publication of a book on a subject which has been treated by many able pens, it may perhaps be found in the growth of the Constitution of the United States which, though confined by its character as a written instrument to certain bounds, was yet intended "to live and take effect in all successions of ages." The delegates who sat in the federal convention wisely, therefore, limited themselves to enumerating the powers conferred on the government and the objects for which they were to be exercised, and left the task of devising the means to those who were to administer the system which they had framed. The government of the United States, consequently, has a capacity for adaptation "to the various crises of human affairs," which is rarely found in written constitutions. Although it is the same government which went into operation a century ago, it has undergone the development incident to maturity, and can act with an assured strength which was necessarily wanting at the commencement.

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The transition might have been indefinitely postponed had not the Civil War awakened the American people to a sense that their national existence was endangered by the laxity with which the Constitution was construed and administered, and that it could not be preserved without a vigorous exercise of the authority vested in the President and Congress. Above all, they were made to feel that the United States are a government of and for the people, acting directly on them, and having a paramount claim to their allegiance which may be enforced by arms as well as laws. The existence of such a right and duty is plainly written in the Constitution. Though long questioned in some quarters, it was vindicated by Hamilton and Webster with unanswerable logic, and finally put at issue in the Civil War, and decided in favor of the United States. The arduous conflict with secession called forth powers that had previously lain dormant, and the peril to which the country was exposed naturally inclined the courts to strengthen the government, and uphold every law passed in good faith for the suppression of the insurrection. Some of the acts done under the stress of such a struggle lay near the boundary line of the Constitution, if not beyond its verge, and gave rise to complex questions which were brought into court. The steps taken during the height of a civil war, and for the reorganization of the hostile territory when overt resistance ceased, were for the first time in the history of mankind submitted to the judiciary, and tested by forensic and constitutional principles. It is not surprising that the intricate problems thus presented

were viewed differently even by candid minds, and that while some of the best citizens thought that force had been carried to an extent which endangered freedom, others were of opinion that the vindication of national authority and the maintenance of the Union were a prime necessity, to which inferior considerations must yield. The situation was the more difficult because some of the cases were new to public law, or had never been authoritatively examined and defined; many were of the first impression under the Constitution of the United States, and all had to be considered and decided while the fires of the recent conflict were still smouldering. Hence arose a conflict of opinion on the bench not less than at the bar, and controversies of great moment were not unfrequently adjudged by a divided court, and sometimes by a bare majority of five voices against four. A vast and untravelled field was thus thrown open for critical examination and research, and years may pass before it is thoroughly explored. Under such circumstances the duty of a student of public law is both difficult and obvious. Jurisprudence is a science which must suffer unless pursued with a single eye to truth; and while the decisions of a court of last resort are conclusive between the parties, they are also steps in the process by which an accurate conception of public and private law may ultimately be attained.

A writer who passes them in review should therefore give the opinions of the judges, whether conflicting or concurrent, as fully as circumstances will permit, and yet not hesitate to state his own, and the grounds on

which they have been formed. Should he err in such an endeavor he may still hope that his mistakes will be corrected by abler thinkers, and may indirectly contribute to form the public opinion which in the long run guides legislators and courts.

I may add that this work is an embodiment of a course of lectures delivered in the Law School of the University of Pennsylvania, with such additions and modifications as are made requisite by the current of decision and events.

The author has been assisted in reading the proof-sheets and otherwise by FREDERICK M. LEONARD, Esq., and in the preparation of the index, by ALBERT B. WEIMER, Esq.

J. I. CLARK HARE.

PHILADELPHIA,

October 22, 1888.

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Due Process of Law as guaranteed by the Fourteenth Amendment does not require that the Case shall be submitted to a Jury, and is satisfied when Provision is made for a Hearing by a Duly Constituted Tri-

bunal. — What the Organic Laws of the Several States provide is, that Trial by Jury shall continue as it stood when they were framed. — The Right is specifically guaranteed in Criminal Cases by the Constitutions of the Several States, but agreeably to the View taken in Pennsylvania, may be withheld in creating a New Offence. — A Preliminary Finding by the Grand Jury is indispensable in the Federal Courts under the Fifth Amendment, but is not secured in the States by the Fourteenth. — The Right of a Jury Trial in Civil Cases depends in general on the English Law as it was brought to this Country and adopted here. — Proceedings in Chancery and the Admiralty, For a Divorce, and Under the Right of Eminent Domain, ordinarily take place without a Jury; and so of Contempts of Court and the Assessment of Taxes. — Cases may be decided summarily by a Justice of the Peace or Commissioner if there is an unclogged Right of Appeal to a Court and Jury. — Can a Judgment against a Servant, Surety, or Corporation be made conclusive on the Master, Principal Debtor, or Corporators?

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during War to prevent it from falling into the Hands of the Enemy rests on the same Principle. — An Unlawful Command is not a Justification, though coming from the Chief Magistrate, a Court, General, or other Military or Civil Superior. — A Naval Officer or Collector is answerable for the Illegal Seizure of a Vessel under Instructions given by the President. — A Recovery in Damages may be had against a General or the Officer acting at his Command for the Seizure of Property during a Campaign, unless the Need was urgent or the Defendant had Probable Cause for so regarding it. — What constitutes such a Cause is an Inference of Law from the Facts, but the Facts are for the Jury.

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It is enough, when the Jurisdiction is original, that the parties should be from different States at the Time when the Judgment is entered; but the Cause cannot be Removed on the Ground of Citizenship, unless the requisite Conditions exist when the Suit is instituted, as well as when the Application is made. — The Right of Removal cannot be circumscribed by State Legislation. — In determining whether the Right exists the Court will have Regard to the actual Relations of the Parties, and not to the Order in which they are ranged by the pleader. — Inconveniences incident to the Removal of Causes under the existing laws. — Separable Controversies, and Removal for local Prejudice or Influence.

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not treason, but may be visited with Death or such other Penalties as may be prescribed by Congress. — The Law of Nations requires every Government to use Diligence to prevent Acts that are of a nature to injure other Nations with which it is at peace. — Counterfeiting the Money or Securities of a Foreign Country, or manufacturing Spurious Notes or Coin with an Intent to circulate them abroad is an Offence within this Principle. — Piracy is Robbery or other act done feloniously on the High Seas, contrary to International Law.

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## LECTURE LIV.

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Distribution of Jurisdiction among the Federal Courts. — The Original Jurisdiction of the Supreme Court is confined to Cases affecting Ambassadors, other Public Ministers, and Consuls, and those in which a

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- A Trespass committed by a Federal Officer is a Violation of the State Laws, and not of the Laws of the United States, although he may be acting Officially, and under Color of a Judicial Writ or an Act of Congress. — An Action will lie in a State Court against the Marshal for arresting A under a Writ against B, or levying on his Goods; and so of the Seizure of a Vessel by a Collector of the Customs under an Illegal Order from the President. — Things or Persons held, though illegally, for the Government cannot be taken out of the Hands of its Officers by a Replevin, or *Habeas Corpus*, from a State Court, unless the Authority relied on is a Pretence, or used as a Cover for a Private Wrong. — The Marshal cannot levy on Goods attached by Sheriff. — If the Court has Jurisdiction of the Cause and the Parties, the Judgment cannot be set aside because the Suit or Prosecution is founded on an Unconstitutional Statute.

## LECTURE LVI.

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- Persons held ministerially by a Federal officer under an unconstitutional Command or Statute of the United States might formerly be liberated by a *Habeas Corpus* from a State Tribunal. — It is now a conclusive Answer to such a Writ that the Petitioner is "Confined under the Authority or Claim or Color of the Authority of the United States by an officer of that Government." — The return to the *Habeas Corpus* must nevertheless set forth enough to show distinctly that the Imprisonment is under the Authority of the United States and to exclude the idea of Imposition or Oppression. — A State Court cannot restrain an officer of the United States in the Performance of a Duty imposed by Congress, whether the act be or be not Constitutional. — Although a *Habeas Corpus* or Replevin may not be issued by a State Court for

Things or Persons wrongfully taken or held for the United States, the officer may be made Personally Answerable in Trover or Trespass. — Distinction between proceedings *in rem*, which are a Justification against all the World, and a Foreign Attachment, or *Fieri facias*, which only binds the Defendant's Interest in the Goods. — The Sheriff or Marshal will not ordinarily be enjoined from selling the Goods of one man under a Writ against another, and the Remedy is an Action against him or the Purchaser. — A State Court cannot enjoin Proceedings in the Federal Courts, and the Federal Courts are forbidden to issue an Injunction to the State Courts. — A State cannot punish an offence against the Laws of the United States. — A false Oath in a State Court in the Administration of a Law of the United States may be Punished by the State. — Acts which are prejudicial to a State and the United States may be Punished by both Governments. — A Penal Law of the United States may be adopted by a State, and will then be Indictable in its Courts.

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**AMERICAN CONSTITUTIONAL LAW.**



# AMERICAN CONSTITUTIONAL LAW.

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## LECTURE I.

The Constitution of the United States. — Twofold Sources of its Interpretation; viz., the Instrument itself, and the History of the Institutions and Events that preceded its Adoption. — Its relatively long Endurance contrasted with the many recent Changes in the Government of France and with the Innovations of the past Fifty Years in England. — The Character of its Framers; Washington. — Their Conservatism. — The Essential Elements of the Constitution not devised by them, but the Result of the Experience of the Anglo-Norman race. — The War of Independence not a Revolution, but a Defence of Established Rights. — The United States a Sovereign and Integral Nation, not a mere Alliance of Independent States. — Weakness of the Confederation.

IN entering upon the study of the nature and origin of our government, I need not enlarge on the dignity and importance of a subject that commends itself to the attention of every American. The Constitution of the United States is, next to the English Constitution, the great monument of public law of modern times, and one of the most instructive topics that can be presented to a philosophic mind.

If the formative principles were mainly derived from the mother-country, they were applied under circumstances that were to a great extent unprecedented, and gave rise to problems which are constantly growing in complexity and importance. The first and greatest of these was, How to reconcile local self-government with national sovereignty, — a question of grave and increasing significance, not only here, but in Germany, in Austro-Hungary, in France, and in the United Kingdom of Great Britain and Ireland; in short, wherever

mankind seek to practise the art of freedom. The science of politics must, therefore, be everywhere incomplete without a knowledge of the theory and working of a republic which is at once one and multiple, national and federal; but the American lawyer has a direct and practical interest in such an inquiry. The duty which he owes to his country cannot be performed in ignorance of her organic laws, and an accurate acquaintance with their provisions is essential to success in the higher walks of his profession. Our tribunals do not, like those of other countries, simply expound the statute and customary law, but have the difficult function of interpreting the Constitution, and annulling every regulation or command which transcends its limits. The judiciary is the balance-wheel which keeps the General Government and the States within their respective orbits, and prevents them from clashing with each other or infringing the constitutional rights of the citizen. This arduous task would be impracticable but for the aid of a Bar, which, though deficient in organization, and having no common centre, is still fruitful in able and upright men, who might shine with greater brilliancy if gathered at a capital, but could hardly diffuse a more useful or steadier light. This honorable charge will soon devolve on you, and it will be your duty as members of the Bar to maintain the bulwarks that were raised by the founders of the Republic, and strengthened in after years by Marshall, Webster, Pinkney, and other jurists, whose reputation will grow with time, and be cherished as long as the Republic endures.

The Constitution of the United States is a statute framed for the government of a nation; and it is an established principle that the meaning of a statute must, like that of a deed, be drawn from the four corners of the instrument with little or no regard to parol or extrinsic evidence.

The language used in debate may indicate the wishes and inclinations of individual legislators; but it is to the collective judgment of the assembly as finally and authentically pronounced that we must look for the law. Still, there is a legitimate aid to be derived in the interpretation of any instrument from a knowledge of the circumstances out of which it arose;

and we are told on great authority that in construing statutes we may use the mischief which they were meant to obviate as a guide to the nature and extent of the remedy. We may, therefore, even in a legal and technical study of the Constitution, properly inquire by what events it was preceded, who were the parties, under what influences they acted, by what motives they were impelled. Indeed, without the aid of history we should often be wholly in the dark, because the words employed in the Constitution are not infrequently terms of art, and their explanation must be sought in the annals of the country whence we derive our law. The institutions under which we live are to a great extent an offshoot from those of England; and where the analogy fails, the difference arises from specific and well-defined causes and is hardly less instructive than the resemblance. They are in short, two successive phases in the development of the same race; their past is the germ of our present, and England is undergoing a transformation which may, at no remote period, render her political and social condition much nearer to that of the United States than it is at present. One who is unacquainted with the efforts through which English liberty was established can hardly understand the provisions by which our forefathers sought to guard their own freedom; and the pages of Hallam and Blackstone are an almost indispensable preliminary or adjunct to the study of Hamilton and Marshall.<sup>1</sup>

In turning from the history of other countries to that of the United States, we shall find nothing more remarkable than the length of time during which the Constitution has endured, giving order, prosperity, and happiness to the American people. This may seem a paradoxical assertion with regard to a frame of government that has not much exceeded the fourscore years allotted to the life of man, the foundation of which was witnessed by persons still living and who may conceivably behold its fall. But everything in this world is relative; and if all political institutions are liable to change,

<sup>1</sup> See *Munn v. Illinois*, 94 U. S.; *Boyd v. The United States*, 116 U. S. 616, 626; *Palaiet's App.*, 67 Pa. 477, 485.

experience has shown that none are so essentially transitory as those through which nations in times of crisis seek to restore order or place liberty on a secure foundation. Written constitutions have almost always been inscribed on the sand, failing in the hour of their birth, or passing away soon after, without leaving a trace of their existence.

Seldom have brighter anticipations been entertained by the friends of humanity and freedom than when the great body of the French people arose from a prolonged servitude to do away with the privileges of caste, and assert the right of mankind to self-government. Everything at first seemed to promise a prosperous issue, — the mild and virtuous temper of the king, the liberal views entertained by the greater part of the wealthy and educated classes, the large number of able and intellectual men who had made the science of politics a study, and whose writings were then instructing Europe.

There was, moreover, the example of England and the United States to point the way to a well-ordered freedom. Yet were these hopes destined to a bitter disappointment, — the most disastrous eclipse that ever darkened the annals of a people. The Constitution adopted in 1791, only two years after the foundation of our present form of government, was, in the course of another year, swept away by the Reign of Terror; and the history of France has since been a long series of efforts to find some mean between anarchy and despotism, some government wise and strong enough to reconcile liberty and order, and protect the citizen without depriving him of freedom. The various forms of Democracy, of Republicanism, of Despotism, and of Monarchy, have been essayed in turn without finding repose, and each laid aside, to be taken up again in a vicious round from which there seems to be no exit.

There are those who would seek the explanation of this result in the character of the French people, — in the supposed defects of the Celtic race, prone to change, and incapable of the self-control necessary to free government. But the true reasons are, as I suppose, those assigned by Mr. Burke, — that institutions must be the fruit of time and cir-

cumstances, and that a nation which breaks with its past will find that it has hopelessly disorganized the future. In framing a government, as in building a house, we must use what lies at hand; and skill is shown, not in ideal plans, but in reducing the materials which we actually possess to shape and form.

France is once more constituted as a republic; and the good sense and moderation of her people under the trying circumstances of the Franco-German war justify the hope that liberty may be established on a durable basis. The lessons of the last ninety years have apparently done much to strengthen, to discipline, and to educate the desire for freedom with which she was instinct during the Middle Ages, and which, though temporarily suppressed by the policy of Richelieu and the firm hand of Louis XIV., broke forth with such volcanic force at the close of the last century.

The art of self-government cannot be taught by schoolmasters or learned from books, but must be acquired through the accumulated experience of generations, handed down traditionally. It is to such a cause rather than to any original superiority of the Anglo-Saxon people over the other Indo-Germanic tribes that we may attribute the success of free institutions in England and the United States.<sup>1</sup>

<sup>1</sup> It may be observed in this connection that the emigration of a people who, like the Chinese, have always been under a despotic government, to a country ruled by universal suffrage, can hardly fail to be attended with one or the other of the following inconveniences. Confer the right of voting, and the emigrants will use it ignorantly or become the tools of demagogues; withhold it, and they will be maltreated by the laboring classes with whom they are brought into competition, and may look in vain for protection to the magistrates and police, who are chosen by and sympathize with their oppressors. This is every day's experience in California; and the subjoined extract from the correspondence of the Philadelphia "Ledger" of Sept. 19, 1880, shows that it is not unknown in New York:—

"The whole trouble originated with the young 'hoodlums,' who are apparently permitted by the police to maltreat every poor Chinaman they see in the street, San Francisco fashion. If a Chinaman undertakes to defend himself, the police uniformly place him in custody; but his assailants usually are permitted to go free."

It is not only as contrasted with the governments of Continental Europe that the Constitution of the United States may claim the merit of stability. England has during the last fifty years felt the hand of innovation; and the changes resulting from Catholic Emancipation, from the Reform Bill of 1832, from the waning influence of the House of Lords, and from the recent introduction of household suffrage, surpass in magnitude and importance any that have been accomplished in our own country. It deeply concerns us to inquire what led to a result disappointing the hopes of the enemies of the Republic, and surpassing the expectations of many of its friends, and how the men of that day came to form a government that should survive them and endure for the benefit of succeeding generations.

In entering on this investigation, it would be unjust not to advert to the character of the men themselves. They were for the most part the natural leaders of the people. In saying this I do not mean that their ascendancy was due to the accidents of birth, wealth, or position, although these had their influence. What I mean is, that they were men whom nature had made or circumstances formed for command. Accustomed to the exercise of power and the burden of responsibility during our colonial history, and on a larger theatre by the struggle for independence, they brought to the administration of the nascent commonwealth a large and varied experience admirably suited to the grave and difficult task in hand. Their character is shown in the admirable tone of the State-papers of the period, and by what remains of the debates in Congress and the Convention, which, with a large and liberal reference to history and to general principles, were yet never betrayed into metaphysical subtlety or abstract speculation, and always knew how to avoid the clouds when it was necessary to tread upon the solid ground.<sup>1</sup> Englishmen by descent,

<sup>1</sup> Chatham justly said in his place in the House of Lords that when "they considered the decency, firmness, and moderation of the papers transmitted from America, they could not but respect their cause and wish to make it their own. He had read Thucydides and studied the master-states of ancient and modern times; but he knew of no nation or body of

they had the marked features of the English mind,—a distrust of theory, a disposition to cling to facts, a willingness to follow and be guided by the thread of precedent; happily tempered by the spirit of philosophical inquiry, in which France was then the mistress of Europe. Though for the most part thinkers of no common order, they were yet essentially men of action,—soldiers, farmers, legislators, lawyers, whose lives had been spent in court, in the Colonial Legislatures, in the pursuits of agriculture and commerce, in subduing the wilderness and the savage foes which the wilderness contained, and later still in devising means to conduct the war with England, or in encountering her armies in the field. Not infrequently these occupations met in the same individual, who passed in turn from the farm to the camp, from the camp to the Bar or Senate. Warren, the physician, fell among the first at Bunker Hill. Hamilton was hardly more conspicuous as a statesman than as an accomplished soldier and leader of the Bar. In Franklin, the printer, were found the man of science, the philosopher, the legislator, the diplomatist, the winning and sagacious man of the world.

This versatility of genius, this capacity to bring the knowledge acquired in one pursuit to bear in another, which was then, as now, a marked characteristic of the American people, was strikingly exemplified in the life of the man who stood at their head, and presided in the Convention that devised the Constitution. I need hardly say that I refer to Washington. At the outset of his career engaged in the comparatively humble occupation of a surveyor; then commanding the troops of Virginia against the French and Indians; afterwards a country gentleman and agriculturist, representing his county

men who for solidity of reasoning, force of argument, and sagacity and wisdom of conclusion, under the most difficult and complicated circumstances, could be preferred to the Congress at Philadelphia.” Praise from such lips may count for much; but it is of greater consequence that the same qualities were consistently displayed throughout the struggle for independence, and during the process of constructing a government to fill the place of that which had been overthrown, and that not to chance, but to a rare union of firmness and moderation, we are indebted for the great and fortunate result.

in the House of Burgesses ; subsequently leading through the long and arduous contest with Great Britain, and not less the trusted counsellor of Congress than the stay of the armies in the field, — no way of life could have afforded a wider scope, or been better fitted to bring forth and enlarge the faculties that were needed to steer the country through the waves of revolution to the destined port that lay beyond.

I have dwelt thus long on the temper of the men who formed and represented public opinion during our revolutionary history, because it seems to me the clew to the result which followed. It might have been predicted, as the event proved, that they would disturb nothing that could be allowed to remain with safety, would use existing means when they were at hand, and when these failed would be guided by analogy in supplying the deficiency. They were, in short, practical and sagacious statesmen, who, while recognizing the necessity for change resulting from time and circumstances, were yet quick to perceive that if the future could be deduced from any other source than the past, it would still be wiser to remould the past than to discard it and build on a new foundation. But great as was their sagacity, it might have been unavailing if, like the delegates who sat not long afterwards in the French national assembly, they had found society hopelessly disorganized, a mass containing hidden fires and ready to break into conflagration at the approach of light and air. Under such circumstances, the best and most patriotic efforts are too often unavailing to save a country from perils that have become insuperable. Fortunately, no such impracticable task awaited those who undertook the reorganization of our government. The outline of the Constitution was already indicated by the force of circumstances, and all that remained to be done was to fill it up in accordance with the long established traditions and sentiments of the people. Success would best be attained by avoiding novelty of design and originality of conception, and adapting existing institutions to the altered state of things.

It was not requisite to enter on the domain of speculation, or to go back to first principles. The true method for the

establishment of a government that should be at once free and durable, had been ascertained by experience, and was no longer a subject of dispute among the English race. That government should be representative and not purely democratic; that numbers should not always or at once control, but according to some fixed rule prescribed by law; that the legislative, executive, and judicial powers should be confided to different hands and kept as far as possible distinct and separate; that the judges should be independent, and the legislature divided into two branches serving as a mutual check, — were axioms which no public man on either side of the Atlantic was likely to dispute; and it was equally well recognized that centralization should be avoided and local matters left to the decision of those chiefly interested. This in the “mark” — the “hundred,” the county and the township — had been a distinctive feature of Teutonic liberty, and found an additional guaranty on this side of the Atlantic in the Colonial franchises and the rights and liberties of the several States.

The above enumeration shows how small a part of the machinery of the government of the United States was devised by the framers of the Constitution — how much taken from forms which long and constant use had rendered not less venerable than familiar. The English Constitution was in fact, to a great extent, reproduced in ours, — not servilely, or with a desire to imitate, but as being in its ultimate development the most harmonious expression of principles which had been endeared to the Anglo-Norman race by centuries of patriotic effort, and which were the moving cause of the war that had separated the Colonies from England.

And here it seems proper to remark that this contest, though commonly styled the American Revolution, had in it little that deserves the name. It was not, like the French Revolution, an uprising of one portion of society against the oppressive domination of another, an effort for freedom by a people who had long been enslaved. It was a purely defensive struggle, prosecuted by men whose claim to be free had never been questioned, to vindicate long-established

rights and chartered privileges. The leaders were generally from the wealthier classes, valuing themselves on their descent or family connection, and — which seldom happens when revolution is on foot — continued to hold a first place until the contest was brought to a successful issue. When that came, nothing had been subverted. Laws, religion, property, remained on their former basis; the only alteration was the severance of the tie that had bound the Colonists to the mother-country. Never did a revolt, destined to produce such momentous results, work so little immediate change. A traveller passing through the country might have seen the poverty and suffering incident to an arduous and protracted contest; but he would hardly have guessed that one sovereignty had been overthrown, and another instituted. This general acquiescence, this orderly transition to a new series of events, was due to causes which had never before in the history of the world prevailed to anything like the same extent. The early Colonists brought the principles of self-government with them from England, and began to put them in practice almost before landing from their ships. Each colony became a miniature republic, enacting its own laws, choosing many of its local magistrates, providing, or neglecting to provide, for its own defence. Following the lead of England like a fleet of small craft in the wake of a man-of-war, they yet had in themselves all that was essential to separate existence, and might at any moment if cast adrift, spread their sails with a not unreasonable hope of reaching port. When a governor nominated by the proprietary, or by the Crown, had been replaced by one chosen by the people, the change was accomplished. The other branches of government remained the same, and were administered as they had been previously. In Connecticut and Rhode Island there was absolutely no alteration. The governor had always been elected by the people, and the charters which had been granted by the Crown sufficed for the government of the State after allegiance to the Crown had ceased, and were not laid aside until a comparatively recent period. That can hardly be called revolution where government remains for the greater part on

the same basis ; and it is only in a limited sense that such a term can be applied to the War of Independence. When Louis XVIII. returned to France at the Restoration, the Comte d'Artois declared that the only difference was one Frenchman more. It might have been said with more truth that the overthrow of the supremacy of England was but a sentiment the less, so light had been the yoke, so full the exercise of the right of self-government. Yet the change was not on that account necessarily the less material. If things influence us through the ideas which they impress, ideas are for many purposes things. What the sun is to the planets, keeping each in its appropriate sphere, the mother-country had been to the Colonial system. It was through their allegiance to the Crown that the Colonists had felt and acted as one people ; and there was reason to apprehend that the rupture of the common tie would be followed by discord that might end in an internecine conflict.

The several States were not merely deficient in wealth and population, they did not sufficiently possess the respect and affections of the people. It was jealousy of a central power, rather than devotion to the local sovereignties, that prevented the earlier formation of an efficient general government. The Colonists no doubt had the local pride which binds the burgher to his town, the peasant to his homestead. Virginia was then as now peculiarly dear to Virginians ; the inhabitant of Massachusetts felt a just pride in his Puritanic descent ; the Philadelphian clung to his city ; and the rice-planter of the Santee or the Edisto entertained that exclusive regard for South Carolina which has been displayed with so much intensity since she became a State : but these sentiments were essentially provincial. They were not, and could not be, in any just sense national.

The patriotism of the Colonists was a patriotism of race. The mother-country was still familiarly spoken of as home ; under her flag they had successfully combated the French and their savage allies. They fondly claimed her common law as the best guaranty of their freedom. It was by virtue of their birthright as Englishmen that they took up arms

against the arbitrary measures of the English Parliament; and this birthright was one common to them all. When it was assailed by a blow struck in Massachusetts, all felt the injury, and united for the common defence. As the contest proceeded, it changed its character, resulting in a declaration of independence. A new people came into existence; another nation was born into the world. That nation was not Virginia, or Massachusetts, or Pennsylvania; it was the United States of America. As if by prophetic anticipation, the nascent commonwealth was baptized by a name indicating that its sway was to be continental and imperial.

“My Lords, I rejoice that America has resisted,” exclaimed Lord Chatham; and it was as Americans that we were eloquently vindicated by Burke in the House of Commons. Washington’s care was for the Union which he helped to form, and he was saluted as father by the entire country, from South to North. The fame of Franklin redounded not to Massachusetts, where he had been born, nor to Pennsylvania, where he was domiciled, but equally to every State in the Union, and was shared by all Americans.

While the United States was regarded as a whole by the best and most patriotic citizens, there were many obstacles to the realization of such an idea. The country lay parcelled out into thirteen distinct territories, each claiming to be sovereign, but wanting nearly all that is essential to independence. Each had, it is true, a regularly organized government,—a legislature, an executive, a judiciary, the authority to levy taxes, to make and administer laws. On the other hand, nearly all these things were wanting to the nation in its collective capacity as the United States.

But to every one who looked below the surface, it was apparent that with much of the show of power, the States wanted its essentials; that they had not the wealth, the population, nor the credit requisite for national existence. Above all, they were deficient in the moral force, the sense of obligation, which binds the citizen to his country, the subject to his king, and more than armies prevents rebellion.

That sentiment, prior to the Declaration of Independence,

took the form of a loyal devotion to the Crown, and when the Crown fell, became justly due to the American people. Community of laws, of origin, of language, of religion, natural boundaries, all that goes to constitute a nation, were theirs already, except the central and controlling authority which had been supplied by the English Government. If this want could be made good, the new country might reasonably anticipate a long era of prosperity. If it could not, there was too much reason to fear that the clouds which darkened the horizon would obscure the entire atmosphere. The States were too near not to become enemies if they attempted to live merely as friends. Sprung from the same blood, members of the same household, discord must inevitably ensue unless the family tie was recognized and some common head obeyed. Established by grants made in the wildest ignorance of the topography of the great unknown land which fortune had placed at the disposal of the English Crown, they had for the most part no natural boundaries, did not follow or control the courses of the great rivers, had in some instances no sure means of access to the sea. If Pennsylvania had remained an isolated commonwealth, patriotism and necessity would have impelled her rulers to acquire such control of the capes which enclose the estuaries of her great rivers as would enable commerce to find an unobstructed exit. The State of Delaware might have fallen in such a struggle, and Maryland might have experienced a similar fate in a contest with Virginia for the dominion of the Chesapeake, while New York could not easily have suffered her seaboard on the Sound to be monopolized by Connecticut. No sufficient means could be devised to prevent a contraband trade between the States, and suppress smuggling along the lines of the frontier that ran back from the Atlantic, across the Alleghanies to the unexplored West. It was absurd and visionary to suppose that the several States could have a true or permanent national existence. The weaker would inevitably have been devoured by the stronger; the strongest did not, with the exception of Virginia, number half a million of souls. All were wanting in the wealth and power

necessary to command respect abroad or secure obedience at home. If a Union could not be effected peaceably, it would be made by the sword, and a military despotism would take the place that should have been filled by a commonwealth.

These truths were too self-evident to be denied, and made their way in one form or other to the hearts of all men. Accordingly, when it became necessary to declare the independence of the Colonies, no one seems to have entertained the idea that the act would give birth to thirteen separate nationalities, and not to an American people. On the contrary, Congress, speaking professedly as the representative of the United States in their aggregate and national capacity, proceeded to declare, not the several States, not Massachusetts, Carolina, or Virginia, but these United Colonies free and independent.

This was not the exercise of a legally delegated power, but was a revolutionary act, ratified by the successful result of the war. Hence an inference that as the States were Provinces prior to the Declaration of Independence, so they retained that character subsequently, and did not become severally or individually sovereign through a declaration made in their collective capacity as the United States.

This argument seems to be sound within certain limits; but should not be pushed too far. It was the United States, and not the several States, which sent ambassadors abroad to seek aid from foreign nations. It was with the United States that France and Spain formed treaties of recognition and alliance. If South Carolina or Massachusetts had withdrawn from the Confederacy, the Courts of Versailles and Madrid might consistently and without a breach of faith have refused to recognize the seceding commonwealth.<sup>1</sup>

It is historically as well as politically true that Virginia never had a distinct national existence. Her greatest statesmen, her most earnest patriots, Washington or Patrick Henry, made no such claim.<sup>2</sup>

<sup>1</sup> 4 Madison's Writings, 290, 321, 422.

<sup>2</sup> "Massachusetts or Virginia is no better defined and no more thought

While recognizing this truth, we should be careful to distinguish between the relations of the States to foreign powers and their relations to their own citizens. In renouncing their allegiance to the English Crown, the Colonies acted severally for certain purposes, collectively for others. As it regards the former, they became, as they still are, sovereign, though not independent. As it regards the latter, they mutually agreed that the sovereign powers which had hitherto been vested in the English Crown and Parliament, should pass to a new government, which, though having no direct relation to or control over the citizen, was yet authorized to bind the States though destitute of the means to enforce the obligation. While the new country was still nascent, Articles of Confederation were executed by which the distinctive attributes of sovereignty were conferred on the United States. Congress was authorized to negotiate treaties, form alliances, regulate the value of money, make war and peace; and these powers were withheld from the several States. The authority thus conferred was not a mere delegation or letter of attorney that might be revoked at pleasure, but a frame of government which, though imperfect, was designed to last through successive generations; and that this might not be left in doubt, the Confederation was expressly declared to be perpetual.

A State or people which has forever parted with prerogatives such as those above enumerated, which cannot make treaties, send ambassadors to foreign Powers, fix the value of its coin, declare war, or when hostilities have commenced, negotiate a treaty of peace, without the consent of another and controlling power, can scarcely be said to be sovereign in the sense in which sovereignty is synonymous with independ-

of by foreign powers than the county of Worcester in Massachusetts is by Virginia, or Gloucester County in Virginia by Massachusetts; and yet these counties, with as much propriety, might oppose themselves to the laws of the State in which they are, as an individual State can oppose itself to the Federal Government, by which it is, or ought to be, bound." Letter of Washington to Dr. William Gordon, 1 Bancroft's History of the Constitution, 320, Appendix.

ence. Such sovereignty as it possesses must be local and municipal, and wants the distinguishing features which entitle a State to rank in the family of nations. Mr. Jefferson, indeed, seems to have thought that the Confederation was temporary, and would expire by the implied limitation of the grant as soon as independence was achieved; but this is contrary to the express words of the instrument.<sup>1</sup>

If the States were manifestly wanting in the requisites to national existence, the United States as then constituted were equally deficient, although from different causes. There was one inherent weakness that would alone have rendered the Articles of Confederation impotent for the purposes of government. The legislation of Congress was ineffectual until another law was passed to enforce it. It was a mere recommendation that might be disregarded with impunity. The Congress were, for instance, authorized to raise armies; but they could not compel a single man to serve, except by calling on the States for their respective quotas, which might be withheld. They might ascertain how much was requisite to defray the expenses of the government, but they could not lay a tax or collect dues or customs. They might borrow money, if any one was credulous enough to lend it; but the only means of payment were through requisitions on the States, which there was an increasing disposition to refuse. It was true not only in these instances, but of all the powers conferred on the Confederation, that there was no effectual means through which they could be executed.

The Confederation was not only unable to use its powers effectually, but much that is essential to national existence was withheld from it, and left to the conflicting legislation of the several States. Congress had, for instance, no power to regulate commerce or to impose or levy duties or customs on foreign or imported goods. Each State, consequently, might and did establish a separate tariff, subject to all the evils that must arise if the scale of duties was unequal, or if one State should adopt a policy of free trade, and another a policy of

<sup>1</sup> See Mr. King's speech in the Federal Convention, June 18, 1787.

protection. Nor was this all. There were no means of bringing the power of the nation to bear in aid of the domestic authority of a State. The Confederation was not authorized to maintain order or suppress insurrection, unless, perhaps, in case of a rebellion against the United States. Still less was there any power to compel the militia of one State to march for the suppression of an outbreak in any other. Such a state of things could not result in good, and the circumstances were singularly favorable to the growth of the evils which it was calculated to produce. I have already stated that the loyalty which attends on national authority did not and could not exist towards governments so provincial as the Colonies, and was, on the contrary, entertained for the British Crown as the common representative of the Anglo-Saxon race on both sides of the Atlantic; and when the Crown fell in the struggle for independence, the Confederation succeeded to its place. Had that been organized as a strong though limited government, able to enforce obedience and call forth the strength of the people, the war might have been brought to a close some years sooner, and the country would in all probability have avoided the weakness and prostration that followed. Unhappily, the Confederation, unable to compel the several States to fill their quotas or furnish the requisite supplies, left the army in a state of destitution which rendered it inefficient, and but for the patriotism of the soldiers, and the firmness of its chief, would have been attended with fatal consequences. The defect became still more apparent after the termination of hostilities when the pressure of an invading force was removed, and the impotency of the government was then so clearly revealed that it fell into contempt abroad, and could not be regarded with respect at home. The country ceased to take an interest in the proceedings of a body which could not carry its resolutions into effect, and there was an increasing disinclination on the part of the States to send delegates to Congress; while the members became remiss in their attendance, and it was difficult to obtain a quorum for the transaction of business.

Man has not yet advanced sufficiently far to dispense with

government, as any people that makes the experiment will find to their cost; and the United States were soon to feel the effect of placing impotence in the seat of power, and trusting weakness to do the work of strength. The termination of the war left the country in a state that threatened to produce the most serious consequences. A disbanded and unpaid soldiery found their lands devastated by the hand of war, or encumbered with debts contracted for the support of their wives and children. Suffering produced discontent; which, displayed at first in murmurs, proceeded in some parts of New England to violence. Armed bands closed the courts, or threatened the lives and property of the friends of law and order. It was demanded that debts should be expunged, and an agrarian law was suggested as the only remedy for the times. In Massachusetts these disorders culminated in an insurrection, which was not suppressed without a conflict and loss of life.

Mr. Jefferson, with a levity that seems unpardonable in a statesman of mature years and large experience of public life, noted the occurrence as a cause of gratulation. Sounder men, and among them General Washington, did not disguise their solicitude for the future; and their apprehensions, openly expressed, were among the more immediate causes that led to the meeting of the Convention which tranquillized the public mind by devising our present form of government.<sup>1</sup>

<sup>1</sup> See 1 Curtis' History of the Constitution, 399; 2 Rives' Life of Madison, 176, 225, 577, 583.

Jefferson to Colonel Smith: "God forbid we should ever be twenty years without such a rebellion. . . . We have had thirteen States independent for eleven years. There has been but one rebellion. That comes to one rebellion in a century and a half for each State. What country before existed a century and a half without a rebellion? And what country can preserve its liberties if its rulers are not warned from time to time that this people preserve the spirit of resistance? Let them take arms. . . . What signify a few lives lost in a century or two? The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is its natural manure. Our Convention has been too much impressed by the insurrection of Massachusetts, and on the spur of the moment they are setting up a kite to keep the hen-yard in order."

I do not impugn what may justly be termed the "sacred right of re-

volution." When suffering becomes intolerable, an oppressed majority or minority may justly take up arms if there are no other means of redress. The question then is like that which presents itself to the surgeon: "Is there such a reasonable hope of success as will outweigh the risk and pain incident to the operation?" But a man who in mature life and at a critical period can write thus childishly of the evils incident to civil war, is hardly a safe counsellor either for a king or people.

## LECTURE II.

The Constitutional Convention ; Its Object,— the Creation of a Strong but Free Government. — The Methods discussed. — Federation. — Centralization. — Concurrent and Co-ordinate Government by the States and the United States. — A System without Historical Precedent. — Analogies in the Feudal System and in the Jurisdictions of the Courts at Westminster. — The Relations of State to National Legislation. — The Supreme Court of the United States the Final Arbiter of Constitutional Questions. — The underlying Rule of Adjustment between the State and the United States the Common-Law Principle that the Validity of a Command or Act depends on the Legal Powers of the Source whence it proceeds. — Nullification. — The Method provided for amending the Constitution an Indication of the Subordination of State Sovereignty. — The System of Representation in Congress partly Federal, and partly National. — Recapitulation.

AFTER various efforts for the reformation of the existing system, and among others an assemblage of delegates from five States at Annapolis, had proved abortive, Congress, on the 21st of February, 1787, adopted the following resolution: "It is expedient that on the second Monday in May next, a convention of delegates, who shall have been appointed by the several States, be held at Philadelphia, for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several Legislatures such alterations and provisions therein as shall, when agreed to by Congress and confirmed by the States, render the Federal Constitution adequate to the exigencies of government and the preservation of the Union." Delegations from all the States, with the exception of Rhode Island, met at the time and place appointed ; and having chosen George Washington as their President, entered on deliberations which, next to those which resulted in Magna Charta, have had the greatest and most beneficial influence on the political development of the United States.

What has been said will perhaps render it evident that the task which the Convention had before it was one that practical and sagacious minds might reasonably hope to accomplish. It was not to ascertain the principles on which a free government ought to be based. These had been evolved during the struggles of the English nation for freedom, were vindicated in the great Rebellion and the trial, judgment, and execution of Charles I., had triumphed in the Revolution of 1688, and were accepted with unquestioning faith by the people of the United States. It was not even to inquire by what methods these principles could best be applied on this side of the Atlantic. That problem had been solved in the various Colonial and State governments.

It was to ascertain how the void made by the overthrow of the supremacy of England could be filled, and a government created that should worthily represent the nation, without infringing the local liberties that were hardly less dear to the people than their national existence.

Two methods were obvious on a superficial view, although to a sagacious mind neither promised a favorable result. One was that of so amending the Articles of Confederation as to enlarge the circle of its powers, while leaving the States in possession of the means by which those powers were to be carried into effect. In this way the Union would remain merely federative, and be a league of States rather than a nation. If, for instance, Congress were empowered to regulate commerce, the rules which they prescribed would be inefficacious until they were enforced by the States, and might be violated with impunity in any State which did not see fit to render them binding on its citizens. The manifold evils of such a plan had become so obvious to all men through bitter experience that it had comparatively few advocates in the Convention, and was finally abandoned by some of those who had originally been its friends. Another plan was to consolidate the States,—effacing the State lines, or retaining them only as the boundaries of provinces or departments. This plan would have had the merit of simplicity and clearness. All that was needed was to take the Constitution of any one

of the States and apply it to the nation. In following this course, the Convention would proceed in a beaten track, and be guided throughout by precedents that were universally respected. But the country was not then, any more than it is now, prepared to surrender its local franchises, or forego the guaranties which these might derive from State sovereignty constituted within proper limits.

If the States were to exist as distinct political communities, retaining to a great extent their autonomy (and no one who knew the temper of the times could anticipate any other result); if the people were not willing to trust their local rights and franchises to a remote and central power; and if, on the other hand, a merely federal government would not, in the judgment of the wiser and controlling minds of the Convention, give the nation security and order,—what course remained; how should these imperative and yet seemingly irreconcilable demands be satisfied? It was one of those momentous problems which Providence sometimes propounds to nations, and hangs their fate on the response; and from its very magnitude and the anxiety which it aroused, divided the Convention into nearly equal camps. The task was the more difficult because it was not merely to give the American people good laws, or the laws best suited to their peculiar circumstances, but such laws as they could be induced to ratify. Such were the differences of opinion on these important topics that agreement would have been hopeless, but for the obvious truth that the only escape from the dilemma lay in the mutual concession that would leave either party in possession of some portion of what it most desired.<sup>1</sup>

It was at length, after much anxious deliberation, per-

<sup>1</sup> Madison, writing to Jefferson in March, 1787, shortly before the meeting of the Convention, described the difficulties of the situation in the following expressive terms: "The differences which present themselves are on one side sufficient to dismay the most sanguine, while on the other side the most timid are compelled to encounter them by the defects of the existing Constitution;" and he soon after wrote to Washington that the right of coercion should be expressly declared. History, etc., by John C. Hamilton, iii. 249-255; 1 Madison's Writings, 284, 290.

ceived that a national government might be established which acting not upon or through the States, but directly on the citizen, would be supreme through the whole range of its powers, but yet being confined within fixed limits, would not divest the jurisdiction of the States over the matters committed to their care. State sovereignty would remain, although curtailed in its proportions; and out of what the States surrendered, a new government would be formed, not only sovereign, but for all the purposes of its existence, paramount. The power of regulation and adjustment would devolve on the judiciary of the United States, which would act as the balance-wheel of the Constitution keeping the National Government and the States to their respective orbits; and as it would belong to the Supreme Court to declare the law, so it would be the duty of the President to enforce it with the whole power of the Government. But the States would retain a legislative power, embracing the ordinary concerns of life and trade, and absolute within its peculiar sphere. Their sovereignty, like that of the United States, would be derived immediately from the people, and they would be responsible to their constituents and not to the General Government, for the manner in which it was exercised. Each man, each rood of ground, every navigable stream, would, agreeably to this scheme, have two masters both entitled to command and to enforce their orders by appropriate penalties, but with powers so nicely harmonized and adjusted that neither could in the ordinary course of events be brought into conflict with the other.

I have stated that the Constitution was modelled on existing institutions, and did not display great originality of thought or novelty of conception; but the feature to which I have just alluded has, so far as my knowledge extends, no precedent in political history. The feudal system had indeed shown that there might be king, lord, and vassal, and that the duty which the vassal owed to his immediate superior need not necessarily conflict with the higher allegiance due to the king; but the spectacle of two co-ordinate governments over the same territory, supreme within their respec-

tive spheres, and entitled to call their citizens and subjects to arms for the purpose of enforcing their behests, is one for which it might be difficult to find a parallel even in the intricate mechanism of the feudal system. In France, and wherever the feud was fully developed, the vassal's allegiance to the king was derivative through his immediate lord, to whom he was directly bound by the tie of fealty or homage; and he was legally compellable to serve his lord in the field, even against the king, on pain of forfeiture,<sup>1</sup> — a political relation analogous to that which the Secessionists regarded as existing between the General Government and the citizens of the several States, but unlike any that could legitimately arise under the normal working of the Constitution of the United States. Still, it must be acknowledged that in the relations which the provincial assemblies of Brittany, of Languedoc, of Provence, and the other *pays d'états* bore to the Crown of France and to the States-General, there is much to remind us of the system under which we live.

If the conception of the complex relation between the General Government and the States was not derived from this source, it may have been suggested to men versed in the common law by the analogy of the great courts sitting at Westminster, which, though in some respects co-ordinate and general, were in others so essentially limited that their writs, even when running in the name of the king, were not a justification, unless the act which they commanded lay within the jurisdiction of the tribunal by which the order was given. Otherwise the judge, though wearing his robes of office, was not a judge, the adjudication was a nullity, and those acting under it wrongdoers who might be resisted even to the death, or compelled to respond in damages.<sup>2</sup> To men trained in this refined and yet accurate logic, it was easily possible to conceive a government which, supreme up to a certain point,

<sup>1</sup> See Faure, *Histoire de S. Louis*, vol. ii. livre 8, chap. iii. p. 224; Boulainvillier, *L'Ancien Gouvernement de la France*, lettre v. 155, 173.

<sup>2</sup> *The Case of the Marshalsea*, 10 Coke, 68, 76; *Gossett v. Howard*, 10 Q. B. 359, 452; *Williamson's Case*, 26 Pa. 9; 1 Smith L. C. 1111, 8 Am. ed.

would be powerless as to all that lay beyond ; which must be obeyed, at the risk of life and goods, if it issued one command, and might be resisted with impunity if it ventured on another. Agreeably to this idea, as it finally took form and shape, the States were to rule for certain purposes as if the United States did not exist, the United States to act within their sphere as if there were no States ; and as neither could constitutionally transcend the appointed limit, there could in contemplation of law be no collision. If Congress passed a law exceeding the powers of the Union, the act would be void, and those justifying under it trespassers. It might justly be disregarded by the legislatures or executives of the States, or by a private individual ; and if force was employed to carry it into effect, that force might be met by a corresponding resistance.<sup>1</sup> On the other hand, if a State sought to intrude on the domain of the United States, its authority, nay, its very existence as a body politic, would cease on the threshold, the ordinance through which the attempt was made would be invalid, and those acting under it would lose their public and official character, and be, like other trespassers, liable to arrest and punishment.<sup>2</sup>

I have described the States as being within their appropriate sphere not less sovereign than the United States ; but this statement must be taken with some qualifications. A State law is as much a law, and has the same obligation, as if it were enacted by the United States or any other sovereign

<sup>1</sup> The United States *v.* Lee, 106 U. S. 196.

<sup>2</sup> Poindexter *v.* Greenhow, 114 U. S. 270, 291. "An unconstitutional act is not a law, — it confers no rights, it imposes no duties, it affords no protection, it creates no office, it is in contemplation of law as inoperative as though it had never been passed;" and hence if persons are appointed under it to fill an office which it assumes ineffectually to create, their proceedings will be merely void, and cannot be sustained on the principle which lends authority to officers *de facto*, because "there can be no office *de jure* or *de facto* if there be no office to fill." Norton *v.* Shelby Co., 118 U. S. 425, 444; Carleton *v.* The People, 10 Mich. 250. See The State *v.* Carroll, 38 Conn. 449. The rule was laid down in the above instances with regard to a State law; but it is not less applicable to an act of Congress.

power. Nay more, if the matter is one over which the States have jurisdiction and the General Government has not, the State law will be binding, and that of the United States invalid. If this were all, both governments would stand at the same level, and no just claim to supremacy could be advanced on either side. But the statesmen who framed the Constitution were too clear-sighted to suppose that power could be shared by two sovereignties, each calling itself supreme, without a conflict of jurisdiction. They knew that co-ordinate governments ruling the same territory might, and in the nature of things must, clash in the exercise of their authority; that unfounded pretensions would be advanced on either side, and acts done which, if sincere, would still be illegitimate. The States were, indeed, distinct from the United States in their powers, or held them for different ends. As to this there was in general a plain line of demarcation. But the subjects over which power was to be exercised were the same in both instances,—the same goods, chattels, persons, lands; in short, whatever was contained within the geographical boundaries of the Union.

A State and the United States might tax the same house, or the same bale of merchandise, and the fund be inadequate to satisfy both demands. Inconsistent or conflicting duties might be imposed simultaneously on the citizen: he might be commanded to do and to forbear, and be punished by one sovereign for obeying the injunctions of the other. The difficulty was surmounted by an explicit declaration that the Constitution and the laws made in pursuance thereof should be the supreme law of the land, anything in the Constitution or laws of the States to the contrary notwithstanding. By these means, if a State and the United States exercised dominion over the same subject-matter, the authority of the State would cease, or be subordinated to the superior right of the Union.

A formidable difficulty remained to tax the patriotism and genius of the Convention. The Constitution and the laws made in pursuance thereof were, by the terms of the instrument, to be supreme. It followed conversely, by an implica-

tion not less plain than if the idea were expressed in terms, that the power of the national legislature was not to extend beyond certain limits; and that if these were transcended, the act would be null, and might be treated as such by the States or by the people. The obstacle which had been encountered at the threshold recurred in another form. A State might deny that Congress had the power which they assumed to exercise, and allege that it was vested exclusively in her. It was easy to foresee that questions would arise of great perplexity, and requiring a nice discrimination. The interpretation of a written instrument is attended with uncertainty, even to accurate and impartial minds. A jurist in his study, or a judge upon the Bench, is not always able to discern the true import of a constitutional power or restriction. If controversies arising from such a source were thrown into the sea of politics, to be decided by a popular vote; if the States were to pronounce on one side, and the General Government on the other, — complications might arise of a serious character. It was therefore necessary to provide some arbiter whose decision should be recognized as final.

Various plans were proposed for that purpose, and among others that Congress should be empowered to abrogate or repeal the legislation of the several States.<sup>1</sup> This suggestion would obviously have been preferable to the theory of the great nullifier, — that a State may declare the acts of Congress null and void. It was, however, wisely rejected, as placing the States absolutely under the control of the General Government. It was finally resolved that such questions should receive a judicial determination. They were legal, not political, depending on the construction of a written instrument, and ought to be referred to a court properly constituted for the purpose. Such a tribunal might obviously be appointed by the States, by the General Government, or be a mixed commission deriving its authority from both. The last method might have seemed most likely to secure impartiality,

<sup>1</sup> See Madison's letters to Jefferson in March, 1787, and to Edmund Randolph on the 27th of the same month. *History, etc.*, by John C. Hamilton, iii. 249, 251; 4 Madison's Writings, 284, 288.

but would not have been so well fitted to establish that supremacy of the Union which the framers of the Constitution kept steadily in view.<sup>1</sup>

The judicial power of the United States was accordingly vested in a Supreme Court, and such other courts as Congress might establish, and was declared to extend to controversies to which the United States should be a party, to controversies between the States, between citizens of the different States, and to all cases in law or equity arising under the Constitution or laws of the United States, or treaties made by their authority. If a conflict of jurisdiction occurred between a State and the United States, the Courts of the United States would consequently be the arbiter, and could not be expected to incline against the government of which they formed a part. No mark of the relative inferiority of the States is more significant than this. A government which must take the law from the tribunals of another government established over the same territory, and learn from them how far its powers extend, may be in a limited and exceptional sense sovereign, but can hardly be termed independent. The Constitution was thus made symmetrical, and an exact balance provided among the several parts.

The genius of the common law admirably favored this design. It had long been established in England that the validity of a command depended, not on the nature or dignity of the source whence it came, but on whether the person by whom it was given had the power which he claimed, and that a mandate which exceeded his authority would be invalid, although issued in the most formal way to a subordinate, and compelling the latter to choose between the opposite dangers of disobedience and submission. The obedience due by the sheriff to the court, by the soldier to his general, or even by a minister to the Crown, could not be relied on as a justification for any act which the superior could not lawfully enjoin. And so far was this carried, as I have elsewhere shown, that if the Court of King's Bench had entertained a writ of right,

<sup>1</sup> See 4 Madison's Writings, 284, 290; and Madison to N. P. Trist, December, 1831, *Ib.* 238.

or the Common Pleas assumed to exercise the criminal jurisdiction of the King's Bench, the process and judgment would have been alike void, and might have been treated as such by the injured party.<sup>1</sup> The king was not less subject to this rule than his ministers; and while they were responsible for his measures, his command could not be pleaded as a justification for any act on their part which exceeded the bounds of right and law. It is on this principle,—that the validity of a command depends, not on the dignity or rank of the person from whom it comes, but on whether he is duly authorized, and that an illegal order, from whatever source, is void,—that the balance of the Constitution depends.<sup>2</sup> With this key-note, all is order and harmony; without it, the jurisdiction of two distinct governments ruling over the same territory must necessarily descend through anarchy and usurpation to civil war.<sup>3</sup> But so accurate was the adjustment that for seventy years, and until the flood-gates of sedition were intentionally opened, there was no serious jar. If mankind were wise, and knew when they were fortunate, the peace might have been kept in our time, and through succeeding generations. For as the laws of the United States take effect on individuals, an unconstitutional enactment cannot give rise to a conflict of jurisdiction until it results in an infringement of some public or private right. If such a wrong is committed, the injured party may submit at the time, and seek redress afterwards by a suit, or, if the case requires it and he is willing to take the risk, hold his ground, and if need be repel force by force. In either event the question is withdrawn from the field of politics, and becomes judicial. The controversy is not between a State and the Union,—two bodies politic, acting through

<sup>1</sup> The Case of the Marshalsea, 10 Coke, 68-76; Williamson's Case, 26 Pa. 918, 1 Smith L. C. 1111, 8 Am. ed.; Dicey, Law of the Constitution, 203, 311, 314.

<sup>2</sup> Little v. Barreme, 2 Cranch, 170; Mitchell v. Harmony, 13 Howard, 115, 135; Gelston v. Hoyt, 3 Wheaton, 242; The United States v. Lee, 16 U. S. 196, 290; Commonwealth v. Blodgett, 12 Metcalf, 56; The United States v. Cairr, 1 Wood, 56; The United States v. Jones, 3 W. C. C. R. 210, 220.

<sup>3</sup> Poindexter v. Greenhow, 114 U. S. 270, 285, 291.

their duly authorized officers, — it is whether A is liable in damages for enforcing, or B for resisting, the law. The decision of the courts, and ultimately of the Supreme Court, will be conclusive as between the parties; but the *ratio decidendi*, or principle on which the judgment proceeds, is still open to examination, and may if at all doubtful, be considered in the press, the Senate, and the tribunals, until the popular mind is enlightened and the public opinion formed which in the long run controls both law-givers and judges.

It was, indeed, contended at a later period that the Supreme Court is not the final arbiter in such cases, and that a State may nullify or set aside an act of Congress, by resolving that it exceeds the bounds set by the Constitution, and, therefore, is not obligatory on it as an organic whole, or on its citizens. It is strange, and but for the strength of party ties might seem incredible, that Madison should have appeared as the author or promulgator of a theory so much at variance with his original and sounder doctrine, that the government of the United States is founded on the will of the American people considered as a whole, and therefore paramount in all its branches, legislative, executive, and judicial.<sup>1</sup> That such would be the effect of the Constitution if adopted, was explicitly declared by one of its most distinguished opponents, Luther Martin, who urged, in addressing the Maryland House of Delegates, that if the new government went into operation, “whether any laws or regulations of the Congress, or any acts of its president or other officers, were contrary to or not warranted by the Constitution, would rest only with judges appointed by Congress, and by whose determinations every State must be bound.”

If we need further proof of the intention that State sovereignty should be subordinate, it may be found in the Fifth Article, which has a material bearing on the interpretation of the Constitution as a whole, and should not pass unnoticed in

<sup>1</sup> See the Kentucky and Virginia Resolutions drafted, the former by Jefferson, the latter by Madison, 4 Elliott's Debates, 528, 540; 5 Hildreth's History of the United States, 274, 276, 319; and Madison's disavowals in later years: Madison's letter to N. P. Trist, December, 1831, 4 Madison's Writings, 204, 206, 284, 290.

a general survey of that instrument. Agreeably to this provision, save in certain particulars to be hereafter noted, Congress may, with the concurrence of three fourths of the States, amend the Constitution in any way they think proper. Each State is thus brought under the control of the others and of the General Government, who can reduce State sovereignty to a shadow, or, what comes to the same thing, enlarge the powers of Congress, or of the President of the United States, indefinitely. This clause, which as originally drawn, provided that a convention for the amendment of the Constitution should be called on the application of the legislatures of two thirds of the States, was accordingly criticised by Elbridge Gerry as being radically unsound and fraught with dangerous consequences. "The Constitution," said he, "is to be paramount to the State Constitutions. . . . It follows from this article that two thirds of the States may obtain a convention, a majority of which can bind the Union to innovations that may subvert the State constitutions altogether." Hamilton observed in reply that there was "no greater evil in subjecting the people of the United States to the majority than the people of a particular State." The article was then moved by Mr. Madison, and adopted by the votes of all the States present, except Delaware and New Hampshire. It was subsequently amended by providing that no State should, without its consent, be deprived of its equal suffrage in the Senate, and that no amendment made prior to the year one thousand eight hundred and eight, should affect the clauses which forbade Congress to prohibit the importation of slaves before that period, or impose a capitation or direct tax, unless in proportion to the census. Subject to these exceptions, which imply that the Constitution shall not be so amended as altogether to obliterate the States, a State may, by a process wholly beyond its control, be so shorn of its powers as to exist but in name.

Another significant feature of the government of the United States as now constituted is the right to punish the crime of treason, which as defined at common law and by Parliament was an offence against the person or majesty of the king, and

ceased to exist in contemplation of law when the United States renounced their allegiance to the Crown. Although the moral wrong of seeking to overthrow the government, or siding with a foreign enemy, remained the same, it might have been committed with impunity, but for the statutes passed by the several States, because the Articles of Confederation did not authorize Congress to bind the citizens individually, or inflict punishment for crime. Indictments for treason were consequently drawn, after the declaration of independence, and before the adoption of the present form of government, under the State law, and described the offence as committed against the peace and dignity of the State. It followed that while the secession of a State might be a *casus belli* warranting the use of force to compel the fulfilment of the compact, and bring the recalcitrant back to the fold, it was not treason; and had war ensued, it would legally have been the duty of the citizens of the State to take up arms on her behalf and against the Union. The necessity for vindicating the supremacy of the United States in this regard was obvious, and the Constitution accordingly provided that treason against the United States shall consist in the levying war against them, or giving their enemies aid and comfort, and that Congress shall have power to declare the punishment of treason; thus at once establishing that waging war against the nation is a crime, and guarding against the strained construction under which acts not amounting to war had been adjudged treasonable in England. Thenceforth there could be no reasonable doubt that a man found in arms against the United States, or adhering to their enemies whether foreign or domestic, was legally a traitor and not less so because he relied on the command of his State as a justification. This was pointed out by Luther Martin in the Convention which framed the Constitution, and urged as a sufficient cause for its rejection in addressing the Maryland Legislature; and it cannot reasonably be contended that the ratification did not take place with notice that such would be the effect.<sup>1</sup>

<sup>1</sup> See 4 Madison's Writings, 421.

The framers of the Constitution have been censured by writers on both sides of the Atlantic, and, among others, by a recent German essayist, for not having abrogated the sovereignty of the States, or merged it in a republic, which should, agreeably to this view, have been declared one and indivisible, like that inaugurated by the French in 1792. We may believe that this reproach is undeserved. The problem before the delegates was not to establish the best government, but one which would be best suited to the circumstances, and which the American people would accept. Thirteen States, differing in climate, productions, social organization and manners, were to be ruled, not through proconsuls or prefects, but by an Assembly proceeding popularly, and with parliamentary forms. Such a body could not be sufficiently informed, nor could it devote the time and attention requisite for the performance of such a task. The English Parliament is oppressed by the mass of details incident to the government of the British isles. What would be the result were Congress charged with all the local concerns of an empire that extends over half a continent? The choice, like most practical questions in life, lay between opposite inconveniences; and we cannot doubt that the Convention acted wisely in declining to obliterate the States.

The course actually adopted, nevertheless involved a formidable difficulty, that could only be overcome by forbearance and moderation. Were the States to be on an equal footing in the new government, as they had been under the Confederation, or should representation be in proportion to wealth and numbers? As sovereigns, each might claim to stand at the same level, and have an equal voice. If such a rule were adopted, Delaware and Rhode Island would have as many votes as Virginia or Pennsylvania, and the seven lesser States might sway the whole, though having but one fourth of the population. Such a result would have been so obviously unjust that the smaller States were not averse to a numerical basis for the lower House; but they were unalterably resolved on equality in the Senate as a safeguard against the aggressions of communities whose numbers so

much exceeded their own. No single point divided the Convention so much as this. The debate was long and acrimonious, and endured through several days; and both sides manifested a fixed determination not to yield. Yates and Lansing, two of the three delegates from New York, withdrew in anger or disgust, and Hamilton, left without a vote, could only aid by his counsel.<sup>1</sup> It was even intimated that if Virginia and Pennsylvania were obdurate, a union would be formed to the north of the latter State; and Mr. Bedford declared on behalf of Delaware, that sooner than resign her equal right she would look abroad and accept the hand of some foreign Power. Moved by the fear of such a calamity, and in the hope of pouring oil on the troubled waters, Franklin rose to propose that each day's proceedings should be opened with prayer. Such an appeal to the Source of light had, he urged, been made by Congress during the Revolutionary struggle, and their petition was heard and answered. The need of union and forbearance was also enforced by Mr. Geary, who observed that much was expected from the delegates; if they did nothing, war and disorganization would ensue, the existing Confederation would be broken up and there would be no government to take its place. Though Franklin's suggestion was not adopted, we may believe that words marked by so much piety and wisdom did not fall on inattentive ears; and the Convention adjourned for three days, after referring the subject to a committee. When it again met, the committee reported two resolutions, — one, that in the first branch of the legislature, each State should be allowed one member for every forty thousand inhabitants; the other that all the States should meet on equal terms in the Senate. The report was made on the express condition that these propositions should be considered as a whole. They were nevertheless taken up separately, and the first adopted by the votes of five States against three, — three other States being equally divided. When the question was put on the second resolution, it was

<sup>1</sup> History, etc., by John C. Hamilton, iii. 322, 325.

carried by the votes of seven States, notwithstanding the opposition of Pennsylvania, Virginia, and South Carolina.

The effect of these resolutions, as Mr. Ellsworth declared, was to render the government partly federal and partly national. The States would stand on the same footing in the Senate, where each would have as much weight as every other, and the smaller be secure against the numerical preponderance of the larger; but the people of the States, who were also the people of the United States, would be represented in the lower House in proportion to their numbers, and would thus have an effectual guaranty that if the popular will might be thwarted by a coalition of the smaller States, no measure could be adopted which it did not approve.

From the above account of the origin and nature of the Constitution, we may deduce the following inferences:—

1. Sovereignty is indelibly impressed on the government of the United States, by the grant of the supreme legislative authority, by the institution of a judiciary whose decisions rule those of the State tribunals whenever the case arises under the laws or Constitution of the Union, by the possession of the attributes which have in all ages been the badge of sovereign power,—the custody of the sword and the exclusive or predominant right to control the purse. It is a national government, not acting upon or through the States, but directly on individuals; and it is through it, and it alone, that the American people exist as an organic whole, and are entitled to a place in the family of nations.<sup>1</sup>

2. The government of the United States cannot ordinarily or in the normal course of events exercise a supervision or control over the State governments: but it can and does make laws which are obligatory on its citizens, who are also citizens of the States; and as it has an indefeasible right to their obedience, so the States cannot loose the tie which binds them to the United States. In other words, although the States are not as such directly subject to the United States, their citizens are, and through them the States.

<sup>1</sup> 4 Madison's Writings, 321, 418, 421.

3. Two points must be kept steadily in view in interpreting the Constitution, — the supremacy of the Union, and the existence of a qualified sovereignty in the several States. There are in every State two governments, — one deriving its authority from the people of the State, the other established by the people of the United States; each having powers peculiar to itself, and neither of them entitled to exercise any authority that has been exclusively delegated to the other. The State of Pennsylvania cannot, for instance, regulate the navigation of the Delaware, or the United States lay down rules for the acquisition or descent of real or personal property in Pennsylvania. It is, on the other hand, equally clear that if a State and the United States act by virtue of their common powers, or of such as have been exclusively delegated to either, over the same things or persons, and there is not room for both, the authority of the State must yield to that of the General Government. Hence, if a State and the United States tax the same bale of goods, and the fund is not sufficient to satisfy both demands, the State will be postponed. So State legislation for the discharge of insolvents, or the distribution of their assets among their creditors, may be valid so long as Congress does not legislate on the same subject-matter, but will be suspended by the enactment of a national bankrupt law which prescribes a different rule. Moreover, in the event of a conflict of jurisdiction arising from a difference as to the nature or extent of the powers reserved by the States or conferred on the Union, the question belongs, in the last resort, to the Supreme Court of the United States; and its judgment not only concludes the parties, but must be followed to the State tribunals in any future controversy involving the same point.

4. The rights of the States are not less clearly written than those of the United States, and no wise man will wish to see them abrogated or materially lessened. But when their existence is insisted on, to the exclusion of the duty and allegiance owing to the country as a whole, we may be tempted to wish that such a phrase as State-rights had never been pronounced. The due subordination of the States is

essential to the harmonious working of our institutions, and without it, a system comprising so many and such various parts could not long endure. Nor should it be forgotten that the existence of the government of the United States is the surest guaranty for the privileges of the States. Had the Union been swept away in the late Rebellion, the governments that would have been created to fill the void would not have been nicely balanced or hedged in with constitutional restraints. They would have been framed on simple lines, calculated for defence or aggression, and subordinating local rights to the overwhelming sense of necessity.

5. The States are not less essential to the Union than is the Union to the States. A country so vast, bounded by either ocean and stretching through the whole width of the temperate zone, cannot be governed from a single centre. Centralization would be not less pernicious here than it has proved in France; and if, as there is reason to apprehend, events are tending in that direction, every effort should be made to maintain the equipoise of the Constitution and avert a result that would imperil freedom.<sup>1</sup> The cause of State-rights is legitimate, so far as it is synonymous with local self-government and the franchises through which it is administered, and which are its only efficient guaranties. That cause, however, can best be defended, not through the doctrine that a State may at its pleasure break the tie which renders us a nation, nor by a recourse to arms, save for the redress of such intolerable grievances as can be remedied in no other way, but through that broad interpretation of the Constitution in which Chief-Justice Marshall was so great a master, which teaches that if the General Government is sovereign as representing the American people as an organic whole, relatively to the matters confided to its care, the States also have rights which it is incumbent on the United States to regard; while certain other rights have been reserved to the people, and are beyond the reach alike of the State legislatures and of Congress.

<sup>1</sup> See the Tenth Amendment, and 4 Madison's Writings, 139.

### LECTURE III.

Ratification of the Constitution. — The Method adopted by the Convention. — Transmission of the Constitution through Congress. — The State Conventions. — Hamilton. — Madison. — The Organization of the Government.

THE Convention still had to determine in what way the instrument which they had devised should be submitted for ratification to the States and to the people. Like the sages who are said to have given laws to the States of Ancient Greece, the delegates had no enacting power save that which comes from the reputation of superior wisdom. The thirteenth and final clause of the Articles of Confederation declared that no change whatever should be made in any of them, unless such alteration "be agreed to in a Congress of the United States, and be afterwards confirmed by the legislature of every State;" and this provision was, as we have already seen, embodied in the resolution by which Congress called the Convention and prescribed the time and place of meeting. An agent cannot transcend the powers conferred by his principal, but he may recommend what he is not authorized to perform; and as the function of the delegates was purely advisory, they did not hesitate to go beyond the strict line of their instructions. The seventh article of the Constitution accordingly declared that "the ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same." This clause, though obviously revolutionary, as providing for the subversion of the existing government without its consent, was yet one of those bold and sagacious strokes which succeed where a more cautious policy might fail. If Congress did not adopt the Constitution or sanction its submission to

the States, these or any nine of them might still adopt the new scheme of government and proceed to put it in execution.

The Convention, which had labored diligently for nearly four months, was now ready to take the last steps towards the completion of its task. If this point was reached sooner than could reasonably have been anticipated, in view of the multiplicity and importance of the questions involved, it was owing to a singleness of purpose which was intolerant of useless debate, and kept the main issue steadily in view. The draft was referred to a committee on style and arrangement, which, after making various formal, though not unimportant, alterations, reported the Constitution nearly as we have it now. It was then taken up clause by clause, and still further amended; and finally, on the 15th of September, 1788, agreed to by all the States present, through the votes of a majority of their duly authorized representatives. There was, nevertheless, a dissentient minority in some of the delegations; and though Hamilton affixed his signature, he could not cast the vote of New York in the absence of his colleagues. The instrument was then engrossed; and having been again read on the 17th of September, was laid before the Convention for their signatures. Unanimity was regarded as important, and Gouverneur Morris proposed the following ingenious form of attestation, which is said to have been devised by Franklin as one that might be signed without implying approval: "Done in Convention by the unanimous consent of the States present." The Constitution as thus authenticated was then signed by all the members in attendance except Mason, Randolph, and Geary; Hamilton's being the only signature from New York, and Luther Martin, Yates, and Lansing, with some other opponents of the measure, absent.

Could the future have been unrolled before the delegates, we may believe that none of them would have hesitated to put his name to an instrument that was destined to give order and prosperity to a country which in wealth, extent, and numbers, bids fair to be the first in the civilized world. To have been one of the signers of the Declaration of Independence or of the Constitution, is in the eyes of all Ameri-

cans a patent of nobility not only to the man himself, but, so far as our manners permit, to his descendants. Yet so checkered is the course of human affairs, so inextricably are the threads of weal and woe interwoven, that I must qualify my remarks. Had Washington and Pinckney foreseen the subjugation of Virginia, and that South Carolina would be cast down from her pride of place in a contest with the very government which they were establishing, would they have thrown the weight of their influence and counsels in favor of the consolidation of the Union? Or would Randolph, with such foreknowledge, have silenced the forebodings which had led him to withhold his signature, and lent his aid to carrying the Constitution through the Convention of his native State? Would the good resulting from the late civil war to the country as a whole have outweighed in the minds of these patriots the desolation wrought in the section which was their birthplace, and where their dearest associations centred? May we not hope that if they could have looked still farther into futurity, and beyond the painful spectacle to which we have adverted, they would have seen the bonds of fellowship renewed, and North and South fraternally enjoying the blessings of freedom under equal laws?

Although the Convention had guarded against the possibility that Congress might prove adverse by providing that the ratification of the States should be sufficient, they still showed a proper deference for that body by resolving "that the Constitution should be laid before the United States in Congress assembled, and that in their opinion it should afterwards be submitted to a Convention of delegates in each State, chosen by the people thereof under a recommendation from its legislature, for their assent and ratification." They also declared it to be "their opinion that as soon as nine States had ratified the Constitution, Congress should fix a day on which electors should be appointed by the States which had so ratified the same, and a day on which the electors should assemble and vote for President, and the time and place of commencing proceedings under the Constitution; and that after such recommendation the electors

should be appointed, and the Senators and Representatives elected.”<sup>1</sup>

On the 28th of the same month Congress signified their assent by a unanimous vote that “the report of the Convention, with the resolutions and letters accompanying the same, should be transmitted to the several legislatures, in order to be submitted to a convention of delegates chosen in each State by the people thereof.”

The debate was now transferred to the various States, and conducted with no less ability than had been displayed in the National Convention. Never before in the history of mankind had a question involving the future of a nation been submitted to assemblies chosen popularly, and representing the great body of the citizens. It was a veritable plebiscitum, taken under circumstances which enabled the people to form their opinion deliberately, and express it with entire freedom. True, the citizens, with rare good sense and moderation, left the question to representatives, who were for the most part chosen with much discrimination; but the subject was still thoroughly discussed in the press and wherever men met to form or exchange views, and when the various Conventions voted to adopt the Constitution, their decision was ratified by the popular voice. The issue was nevertheless for some time doubtful, and the result might have been adverse but for the efforts made by the friends of the Union. Hamilton, Madison, and Jay enlightened the public mind in a series of essays known as the *Federalist*, which if inferior to the writings of Burke in eloquence, may compare with them in political wisdom.

Hamilton's genius also shone conspicuously in the Convention of New York, where his fervid reasoning not only silenced, but convinced, some of his opponents; and the speeches of Madison, of Ellsworth, of Wilson, and of Pinckney were almost as effectual in Virginia, Connecticut, Pennsylvania, and South Carolina. It is, however, to Washington's weight of character and the unbounded reliance on his judg-

<sup>1</sup> Story on the Constitution, sect. 275.

ment that we may, more than to any other single cause, ascribe the ratification of the Constitution. What he approved could not in the opinion of a majority of his countrymen but be right, and would presumably prove expedient; and when Jefferson was cited in the Convention of Virginia as anxious for delay, and opposed to adopting the Constitution without the additional guaranty of a Declaration of Rights, it was enough to reply that Washington stood on the other side. It was not until a later period that he had occasion to know from painful experience that no popularity, however well deserved, is secure from the shafts of the low ambition which loses sight of truth and justice in the desire for place.<sup>1</sup>

The Constitutional requirement for the adhesion of nine States was satisfied on the 21st of June, 1788, by the accession of New Hampshire; and Virginia followed on the 25th of the same month. The assent of New York, which, from her central position, was geographically essential to the completion of the Union, still hung in the scales, and was not

<sup>1</sup> What Jefferson thought of our Constitution, and how little it owed to his support, sufficiently appears from a letter which he wrote to Adams from Paris on the 13th of November, 1787, soon after the Convention had adjourned. . . . "How do you like our new Constitution? I confess there are things in it which stagger all my disposition to subscribe to what such an Assembly has proposed. The House of Federal Representatives will not be adequate to the management of affairs, either foreign or federal. Their President seems a bad edition of a Polish king. He may be elected from four years to four years for life. Reason and experience prove to us that a chief magistracy, so continuable, is an office for life. When one or two generations shall have proved that this is an office for life, it becomes on every succession worthy of intrigue, of bribery, of force, and even of foreign interference. It will be of great consequence to France and England to have America governed by a Galloman or Angloman. Once in office, and possessing the military force of the Union, without the aid or check of a council, he would not be easily dethroned, even if the people could be induced to withdraw their votes from him. I wish that at the end of the four years they had made him forever ineligible a second time. Indeed, I think all the good of this new Constitution might have been couched in three or four new articles, to be added to the good, old, and venerable fabric, which should have been preserved even as a religious relic." See Jefferson's *Memoirs and Correspondence*, by Randolph, ii. 265.

given until the 25th of July. The opposition there was more violent than in any other State, and the majority against the Constitution was at first so great that its supporters despaired of a favorable result. Washington might well write to Jay that "the exertions of those who were able to effect this great work must have been equally arduous and meritorious."

The ratification by Virginia, like that of some of the other States, was attended with the suggestion of a Bill of Rights for the consideration of the Congress of the United States when that body should assemble, and that of New York was declared to be in full confidence that Congress would not exercise certain powers until a general convention had been called for proposing amendments. Although no such convention met, and Congress entered at once on the full exercise of its functions, the confidence thus reposed was justified, soon after the Constitution went into effect, by the adoption of amendments which gave the desired guaranties for civil and religious freedom.

The ratification of the Constitution was celebrated in Philadelphia and New York with every device emblematic of joy and gratitude, and the children who witnessed these pageants felt a patriotic glow which, as they told the story in after years, was shared by their descendants.

The day chosen in Philadelphia was the anniversary of the Declaration of Independence, as a means of linking the two events in the public mind, and signifying that the work begun on the 4th of July, 1776, was now completed. The celebration in New York followed some three weeks afterwards, and was noteworthy for the honors paid to Alexander Hamilton. His likeness, associated with Washington's, or unrolling the scroll of the Constitution, was borne aloft on the banners of the trades as they filed in long procession, and was greeted by the citizens with enthusiastic applause.<sup>1</sup> Never was popular tribute better deserved, or paid with a more willing heart. It is to him more than to any other statesman, save Madison and the Father of his Country, that we owe

<sup>1</sup> See the Penn. Packet and General Advertiser for July 30, 1788.

the greatness, nay, the existence, of the Republic; and, unlike Madison, he was consistent to the end, and did not adopt a course calculated to subvert what he had reared.

The praise due to Hamilton should not make us forget the claims of Madison, whose synthetic powers equalled Hamilton's, and who, in a letter to Randolph of the 8th of April, 1787, gave an outline of the plan which the Convention subsequently adopted, except that the power to set aside a State law as unconstitutional was vested in the Supreme Court instead of Congress.<sup>1</sup>

Congress now proceeded to name the first Wednesday in January, 1789, for the appointment of electors to choose a President of the United States, the first Wednesday of the succeeding February for the meeting of the electoral colleges, and the first Wednesday of the following March and the city of New York as the time and place for the inauguration of the new government.

<sup>1</sup> "In truth, my ideas of a reform strike deeply at the present confederation, and lead to such a systematic change that they scarcely admit of the expedient. . . . I hold it for a fundamental point that an *individual independence* of the States is utterly irreconcilable with the idea of an aggregate sovereignty. I think at the same time that a consolidation of the States into a single Republic is not less unattainable than it would be inexpedient. Let it be tried, then, whether any middle ground cannot be taken which will support a due supremacy of the national authority, and leave in force the local authorities, so far as they can be subordinately useful." The mode proposed was: "A proportionate representation of the States to their numbers; the national government to be armed with a positive and complete authority in all cases where uniform measures are necessary for retaining the power it now possesses. *A negative in all cases whatsoever on the legislative acts of the States, as the king of Great Britain heretofore had.* This I conceive to be essential, and the least positive abridgment of the State sovereignties. Without such a defensive power, every positive power that can be given on paper will be unavailing. It will also give internal stability to the States. The extension of this national supremacy to the judiciary department. A legislature of two branches, one to be chosen by the legislatures, or the people at large, the other of a more select number, holding their appointments for a longer time, going out in rotation. Perhaps the negative on the State laws may be most conveniently lodged in this branch." Madison to Randolph, April 8, 1787; History, etc., by John C. Hamilton, iii. 250, 251. See 1 Madison's Writings, 288.

Electors having been appointed in the various States, who met and cast their votes in accordance with this recommendation, which had no legal or binding force save from the assent of those to whom it was addressed, and the elections for Senators and Representatives having been duly held, the Congress of the United States assembled on the 4th of March, 1789; but the want of a quorum delayed the count of the electoral vote until the 6th of April, when George Washington was found to have been unanimously chosen as President, and John Adams as Vice-President. Washington was sworn into office on the 30th of April, and the various departments of the government were then organized and went into operation.

These proceedings, like those on which they were based, partook of a revolutionary nature, because two of the States had not ratified the Constitution, and were entitled to insist that the existing government should not be set aside and another substituted without their assent; but the change was so beneficial, and in such entire accordance with the logic of events, that no one seriously contemplated armed resistance, and all pretext for complaint was removed by the accession of North Carolina in November, 1789, and of Rhode Island in May, 1790.

We have, so far as I am aware, no account of the thoughts of the officers of the newly established government in entering on the performance of their duties; but we may infer that while they were not free from the solicitude which the novelty of the experiment, and the responsibility incident to setting so many new and untried springs in motion, were calculated to inspire, they had yet a heartfelt satisfaction in the belief that the anxiety which since the passage of the Stamp Act, and for more than twenty years, had clouded the breast of every American, was at length dispelled, and that the nation, now assured of its existence, was about to enter on a long season of prosperity, which might lead to greatness.

Such we know authentically were the emotions of the members of the Federal Convention when they completed their labors by signing the scroll on which the Constitution

was engrossed. Franklin, Gouverneur Morris, Hamilton, and others of equal weight, had urged the necessity for unanimity and concession, and Washington, for the first time since he took the chair, said a few earnest words in favor of an amendment intended to conciliate the smaller States, which was unanimously adopted.

The delegates then gathered round the secretary's desk to subscribe their names; and while the last was signing, Dr. Franklin, looking towards a sun which was depicted behind the president's chair as on the verge of the horizon, observed that painters in the practice of their art found it difficult to distinguish a rising from a setting sun. "I have," he went on to say, "often and often in the course of the session, and the vicissitudes of my hopes and fears as to its issue, looked at the sun behind the president without being able to tell whether it was rising or setting; but now, at length, I have the happiness to know it is a rising, and not a setting sun."<sup>1</sup> The future did not belie this prediction; but it was not until the inauguration of General Washington as the first President of the United States that the sun of the Republic could be said to be clearly above the horizon.

<sup>1</sup> 3 Madison Papers, 1624.

## LECTURE IV.

The Constitutional Convention. — Authority of the Delegates. — The Resolutions offered by Randolph and by Patterson. — The National Supremacy of the United States asserted, and the Sovereignty of the States, even under the Confederation, questioned by King, Madison, Gerry, Morris, and others. — The United States a Government of Individuals, not of States. — The People, not the States, the Immediate Subjects of its Coercive Powers. — Buchanan's Message.

BEFORE examining the powers of the Government of the United States in detail, it may be well to note the various and not infrequently conflicting opinions which, expressed with rare earnestness and sincerity in the Convention that met in Philadelphia on the 14th of May, 1787, led to the evolution of the Constitution and prepared the way for its acceptance in the States. The authority of the delegates was limited to proposing amendments to the Articles of Confederation, which, agreeably to the thirteenth and final clause of that instrument, would not be binding until approved by Congress and ratified by the legislature of every State. The reason for this requirement is obvious. It was because a perpetual compact — and such the Confederation was, not merely by implication, but expressly — could not be rescinded without the consent of all the parties. There could be no more convincing proof that notwithstanding the weakness of the existing Government, it was viewed, not as a mere delegate or representative of the States whose authority might be recalled at pleasure, but as a principal whose concurrence was essential to the compact. When, however, the delegates assembled, it became apparent that they could not devise an efficient Government without exceeding their instructions both in form and substance. Instead of amending the Confederation, they

proceeded to frame a new Constitution, which was to be submitted for ratification, not to Congress and the State legislatures, but to the people of the several States.<sup>1</sup>

On the 30th of May, three days after the organization of the Convention, it was by a large majority of the States and delegates present resolved, on the motion of Edmund Randolph, from Virginia, that a national government ought to be established, consisting of a supreme executive, legislative, and judiciary; and to this determination the Convention substantially adhered throughout their subsequent proceedings. For although "Government of the United States" was, on the rising of the committee of the whole, substituted for "National Government" on the motion of Mr. Ellsworth, the significant adjective *supreme* remained to control the sentence.<sup>2</sup>

A government consisting of a supreme legislature, executive, and judiciary, and acting directly on all the inhabitants, without regard to local boundaries or jurisdictions, is necessarily a national government, whatever it may be called. This was explicitly stated by Mr. Madison and other delegates; and the proposition is too obvious for argument. In the Convention at the time, and when the question subsequently came before the people, the proposed government was characterized on all sides as national, the only difference being that while the friends of the Constitution pointed out that it was in some points federal, in others national, the opponents of the measure took the ground that the consolidation was complete, and abrogated the sovereignty of the several States.

On the 19th of June, after the scheme of Governor Randolph had been reported by the committee of the whole, Mr. Patterson, on behalf of the New Jersey delegation, asked for time to digest a plan purely federal as distinguished from that

<sup>1</sup> Thus Gouverneur Morris declared on the 23d of July that it was erroneous to suppose that the Convention was "proceeding on the basis of the Confederation. This Convention is unknown to the Confederation." Elliott's Madison, 355 (Philad., 1876).

<sup>2</sup> See Luther Martin's letter to the Maryland House of Delegates, 1 Elliott's Debates, 190.

introduced by Mr. Randolph; and the Convention having adjourned for this purpose, it was on the succeeding day moved by Mr. Patterson that the Articles of Confederation ought so to be revised, corrected, and enlarged as to render the federal constitution adequate to the exigencies of government and the preservation of the Union. He then read a series of resolutions, which, while adding some new powers to the Articles of Confederation, and among them those of regulating commerce and raising a revenue by duties on imports, by stamps on paper, vellum, or parchment, and by postage on all letters passing through the general post-office, and also a clause authorizing the executive to employ the power of the confederated States against any State or body of men who might oppose the acts or regulations of Congress, yet retained the characteristic defect of a merely federal system,—inability to act directly upon individuals, save, perchance, for the collection of customs and the regulation of commerce, or otherwise than by requisitions on the States, or through their officers and tribunals.<sup>1</sup>

His scheme was then referred to the committee of the whole, and Mr. Randolph's recommitted, in order that both might be considered at the same time, and a deliberate judgment formed as to their respective merits. Mr. Lansing, from New York, opened the debate by saying that the plans were in direct contrast. That of Mr. Patterson maintained the

<sup>1</sup> Agreeably to Mr. Patterson's plan, the United States in Congress assembled were, in addition to the powers conferred by the existing Articles of Confederation, to be authorized to pass "acts for raising a revenue by levying a duty or duties on all goods or merchandise of foreign growth or manufacture imported into any port of the United States, by stamps on paper, vellum, or parchment, and by a postage on all letters passing through the general post-office, and to make rules and regulations for the collection thereof, . . . to pass acts for the regulation of trade and commerce as well with foreign nations as with each other, provided that all punishments, fines, forfeitures, and penalties to be incurred for contravening such acts, rules, and regulations shall be adjudged by the common law judiciaries of the State in which any such shall have been committed, . . . subject, nevertheless, to an appeal to the judiciary of the United States." Elliott's Madison, 191.

sovereignty of the respective States; that of Mr. Randolph destroyed it. The latter required a negative on all the laws of particular States; the former only certain general powers for the common good. In fine, the plan of Mr. Randolph absorbed all power except what might be exercised in such little local matters as were not thought worthy of the supreme cognizance. Mr. Lansing then went on to observe that he grounded his preference for Mr. Patterson's plan on the principal objections to that of Mr. Randolph, — first, that the authority of the Convention was by the acts of Congress, the tenor of the acts of the States, and the commissions of the several deputations, confined to amending the Articles of Confederation; and next, that the legislatures of the States would not ratify a scheme so far exceeding the authority which they had conferred.<sup>1</sup> Mr. Randolph in reply said that the true question was whether the Convention should adhere to the federal plan, or entertain the national plan. There were but two ways through which a general government could be efficient, the first being coercion as proposed by Mr. Patterson; the second, real legislation, as proposed by the other plan. Coercion he pronounced to be impracticable, and cruel to individuals. They must resort, therefore, to a national legislation over individuals, for which Congress as then constituted was unfit, as being a single assembly chosen by the legislatures of the States, and not by the people. It was not, however, his intention to vest an indefinite power in Congress, but that the powers conferred upon it should be specifically enumerated. Mr. Hamilton, who followed, differed from both speakers, urging that the national legislature should have the power to pass all laws whatsoever, with a negative on the laws of the several States, and that the executive power should be vested in a chief magistrate holding his office during good behavior. After some further debate, in the course of which Mr. Madison pointed out that "one characteristic of a federal government was that its power was exercised, not on the people individually, but on the people

<sup>1</sup> Elliott's Madison, 193.

collectively in the States,"<sup>1</sup> Mr. Patterson's plan was postponed indefinitely, and Mr. Randolph's reported without alteration.<sup>2</sup>

The Convention proceeded to consider the first resolution of the latter plan, and unanimously resolved that the first article should be so amended as to read that "the government of the United States ought to consist of a supreme magistracy, legislative and judiciary."

The Vice-President of the Confederate States, Alexander Stephens, comments on this vote as indicating a complete revolution in the minds of the delegates, and that the statesmen who had been contending for the sovereignty of the Union were now prepared to admit the supremacy of the States. He dwells on the omission of the word "national," but fails to observe that the other and characteristic features were not changed. The legislature, the executive, the judiciary, of the proposed government were by the express terms of the resolution to be supreme; and hence it would be a national government, whether it was so designated, or by the more appropriate title of the Government of the United States.<sup>3</sup>

<sup>1</sup> Elliott's Madison, 206.

<sup>2</sup> Ibid. 212.

Hamilton, at the next sitting of the committee of the whole, observed that force was among the great and essential principles necessary for the support of government, and might be through a coercion of law or a coercion of arms. The former might be nearly sufficient, though in most cases not entirely so. A certain amount of military force was requisite in large communities. How could this force be exerted on the States collectively? It was impracticable, and would incite to war. To make requisitions a substitute for taxation was therefore fraught with difficulties which would be fatal to the Union. Colonel Mason, of Virginia, though a strenuous opponent of the Constitution, was equally clear that Mr. Patterson's acknowledgment that his plan could not be enforced without military coercion constituted an insuperable objection. "To punish the non-payment of taxes with death was a severity not yet adopted by despotism, . . . but would be mercy compared with a military collection of the revenue, in which the bayonet could make no discrimination between the innocent and the guilty." Elliott's Madison (Phila., 1876), 217.

<sup>3</sup> 4 Madison's Writings, 217, 290. See Luther Martin's Address before the Maryland House of Delegates, 1 Elliott's Debates (Phila., 1876), 190.

During the debate which led to this result, Mr. King observed that the States were not sovereigns in the sense contended for by some. They did not possess the peculiar features of sovereignty, — they could not make war, nor peace, nor alliance, nor treaties. Considering them as political beings, they were dumb, for they could not speak to any foreign sovereign; they were deaf, for they could not hear any propositions from such sovereign; they had not even the organs or faculties of defence or offence, for they could not of themselves raise troops or equip vessels of war. If the existing union of the States comprised the idea of a confederation, it also comprised that of consolidation. A union of the States was a union of the men composing them; whence a national character resulted to the whole. Congress could act alone without the States; they could act, and their acts would be binding, against the institutions of the States. If they declared war, war existed *de jure*; and immediately on the promulgation of the vote, the captures made in pursuance of it were lawful: no acts of the States could vary the situation, or prevent the judicial consequences. If the States therefore retained some portions of their sovereignty, they had certainly divested themselves of essential portions of it. If they formed a confederacy in some respects, they formed a nation in others. The argument that the States were never sovereign in the full sense of the term, was here put in a conclusive light, and, if true of their position under the Confederacy, applies with still more force to the relation which they bear to the United States.<sup>1</sup>

Accordingly, Mr. Madison, on the 29th of June, agreed that the mixed nature of the government ought to be kept in view, but thought too much stress was laid on the rank of the States as political societies. There was a gradation, he observed, from the smallest corporation with the most limited powers, to the largest empire with the most perfect sovereignty. He pointed out the limitations on the sovereignty of the States as then confederated. Their laws bore the same

<sup>1</sup> See Madison to W. C. Rives, March 12, 1833; 4 Madison's Writings, 290.

relation to the paramount law of the Confederacy as the by-laws of a corporation to the laws of the State. Under the proposed government the powers of the States would be much further reduced. According to the views of every member, the General Government would have powers far beyond those exercised by the British Parliament while the States were part of the British Empire.<sup>1</sup> Mr. Gerry, following on the same side, declared that the States had never been independent, were not such then, and never could be, even on the principles of the Confederation.

Mr. Randolph's plan, as originally proposed, gave the General Government a negative on all laws passed by the several States that were, in the opinion of the national legislature, contrary to the Articles of the Union or any treaty made by the United States, and to call forth the forces of the Union against any State failing to fulfil its duty as a member thereof. This clause was upon further consideration dropped. Had it been adopted, the General Government could hardly have been, in any just sense to the term, styled federal, and would, on the contrary, for all practical purposes have been absolute and consolidated. For as the question, what State laws should be overruled as contrary to the laws of the Union, would, if this view had prevailed, have been left to a political assembly, the States would virtually have lost the right of self-government, and been reduced to provinces or departments.

Gouverneur Morris remarked that he was more and more opposed to such a negative. A law that ought to be negatived would be set aside by the judiciary.<sup>2</sup> Mr. Sherman said the power involved a wrong principle; to wit, that a law of a State contrary to the Articles of Union would, if not negatived, be valid and operative,<sup>3</sup>—and this argument seems to have been conclusive. Instead of vesting a legislative negative in Congress, it was resolved that the laws made by Congress under the Constitution should be supreme, anything in the Constitutions or laws of the several States to the contrary notwithstanding.

<sup>1</sup> Elliott's Madison, 256.

<sup>2</sup> Ibid. 321.

<sup>3</sup> Ibid.

The question what State laws should be annulled as contrary to the Constitution, was in this way left to the judiciary of the United States, and not, as had been originally designed, to Congress.<sup>1</sup> Legislation which transcended the powers of the States would still be virtually abrogated; but the end would be attained through the judgment of a court, and not by the vote of a popular assembly.

Mr. George Mason drew in the Convention of Virginia a ludicrous picture of a man who, commanded by his State and forbidden by Congress, punished by the former and rewarded by the latter, cries on one side of his mouth and laughs on the other. If a comparison, which at the time was more creditable to the wit than to the fairness of the orator, became after the lapse of many years a painful reality during the late civil war, the result was due to one of those follies which are not less mischievous than crimes. Such an alternative could not arise under the true theory of the Constitution. The allegation that two supreme powers cannot act together is, as Mr. Hamilton observed, fallacious. They were inconsistent only when they were aimed at each other or at one indivisible object. The laws of the United States were supreme as to all their proper constitutional objects; the laws of the States were supreme in the same way. These supreme laws might operate on different parts of the same object with perfect harmony. A law proceeding from the General Government, or from a State which exceeded the powers of the legislature, was void. If the jurisdiction was concurrent, the State must yield. Doubtful questions would be referred to and decided by the federal judiciary. The Government of the United States acted directly on individuals. There could not, if the path marked out in the Constitution was followed, be a conflict between governments. If a State interfered in derogation of the constitutional authority of the United States, it was a mere usurpation that could not be pleaded or given in evidence as a defence to an indictment for treason.

The idea of national supremacy conceived by Governor

<sup>1</sup> 4 Madison's Writings, 238, 284.

Randolph was thus carried into effect, although by means differing from those which he had suggested; and this was according to every definition given at the time of the distinction between a national and a merely federal system.<sup>1</sup> Thus Mr. Madison, on the 14th of July, remarked that it had been said that the government would in its operation be partly federal, partly national; and that although in the latter case representation ought to be in proportion to the people, yet in the former it ought to be according to the number of States. If there was any solidity in this distinction, he was ready to abide by it; if there was none, it ought to be abandoned. In all cases where the government is to act on the States as such, in like manner as Congress now acts on them, let the States be represented, and the votes be equal. This was the true ground of compromise, if there was any ground at all. But he denied that there was any ground at all. He called for a single instance in which the General Government was not to operate on the people individually.

The Constitution is so entirely moulded on this conception that when it was laid before the people of the several States for ratification, the mooted question was whether consolidation had not been carried so far as to exclude the federal element.

One marked superiority of a national as contrasted with a merely federal plan was pointed out by Gouverneur Morris and enforced by Mason. Mr. Morris explained the difference between a federal and a national supreme government, the former being a mere compact resting on the good faith of the parties, the latter having a complete and compulsive operation.<sup>2</sup>

Mr. Mason, following, said that the Confederation was defective in not providing for the coercion and punishment of delinquent States, but argued cogently that punishment could not in the nature of things be inflicted on a State in its collective capacity, and that a government should consequently be formed acting directly on individuals, and punishing those only whose guilt required it.<sup>2</sup>

<sup>1</sup> 4 Madison's Writings, 290.

<sup>2</sup> Elliott's Madison, 133.

The weight of this argument was undeniable; and when the last clause of Mr. Randolph's sixth resolution, authorizing the force of the whole to be exercised against a delinquent State, came under consideration, Mr. Madison observed that the more he reflected on the use of force, the more he doubted the practicability and the justice of it when applied to the people collectively, and not individually. He hoped that such a system would be framed as would render this resource unnecessary.<sup>1</sup>

It was the perception of this truth which more than any other cause led to the substitution of our present system for that in use under the Confederation. The necessity for coercion, for using force as a means of vindicating authority, was admitted on all sides, not only in the Convention which devised the Constitution, but when it was ratified in the several States. It was as much a feature of the merely federal scheme proposed by Mr. Patterson as of the national government advocated by Mr. Randolph. The difference was as to the mode in which force should be used, and the objects on which it was to operate. As the government designed by Mr. Patterson was of and for the States, and had no jurisdiction over persons, coercion could, according to his method, only be applied to the States. Accordingly, the sixth article concluded with a declaration that "if any State, or any body of men in any State, shall oppose or prevent the acts or treaties of the Confederation, the federal executive shall be authorized to call forth the power of the confederated States, or so much thereof as may be necessary, to enforce or compel obedience to such acts or observance of such treaties."

The national plan, as originally proposed by Mr. Randolph, was equally explicit. But the men by whom it was supported were too able and clear-sighted not to perceive that such a clause was superfluous under a system which, as Mr. Madison pointed out, operated always on persons, and never on States. If one or more of the citizens of a State, or if all of them, refused obedience to the United States, submission would be

<sup>1</sup> Elliott's Madison, 140.

compelled in the ordinary course of law, backed, if need be, by the military power of the Union; but the controversy would in every such case be between the offenders individually and the General Government. And this would be true even if the revolt grew to the height of civil war, and embraced a part or the whole of one or of many States. The State might intervene to shelter the offenders or array her citizens under color of a State law against the nation. In like manner a great city—New York or Philadelphia—might conceivably use the powers conferred upon it for local purposes in aid of a revolt, as we have recently beheld the city of Paris arrayed against France in the name of the Commune. But the legal and constitutional aspect of the question would in either case remain unchanged. It would still be the duty of the National Government to act as if no such complication had occurred, and proceed to the arrest and punishment of the guilty with the least possible amount of injury to the innocent. If the contest rose to the height of war, it would, legally speaking, be a war not with the rebellious State or city, but with a band of insurgents speaking in its name and arrogating an authority which it could not confer.<sup>1</sup> On

<sup>1</sup> *Texas v. White*, 7 Wall. 700; *Thorington v. Smith*, 8 Id. 1; *Keith v. Clark*, 97 U. S. 454, 465; *Poindexter v. Greenhow*, 114 U. S. 270, 291.

The principle is clearly stated in the subjoined extract from the judgment in *Keith v. Clark*, where the relation between Tennessee and the United States is shown not to have been changed, although the governor, the members of the legislature, and the majority of the population participated in the rebellion, because the ordinance of secession was merely void, and those acting under it did not in legal contemplation represent the State, and were simply individuals prosecuting an illegal enterprise which might render them amenable to the civil and criminal law, but did not affect the State as an organic whole.

“The political society which in 1796 was organized and admitted into the Union by the name of Tennessee has to this time remained the same body politic. Its attempt to separate itself from that Union did not destroy its identity as a State, nor free it from the binding force of the Constitution of the United States. Being the same political organization during the rebellion and since that it was before,—an organization essential to the existence of society,—all its acts, legislative and otherwise, during the period of the rebellion are valid and obligatory on the

the other hand, coercion would, on the merely federal plan, lead directly and at once to a war between governments. The land and naval forces of the Union would be directed against the offending State with the avowed object of inflicting punishment militarily for the default. The inhabitants of the invaded territory would take up arms in self-defence, and a contest would ensue, directly and necessarily involving the innocent with the guilty.

The contrast between a government in which military force was to be the first, instead of the last step in the process of compelling obedience, was too much in favor of the friends of the Constitution to be overlooked. Accordingly, they enlarged on the hardship and injustice of punishing the inhabitants of a State as a whole for an offence which some and perhaps the greater part of them did not share, and insisted on the superiority of a government that would judge the citizen individually and deal with him according to his deserts. On the other hand, the opponents of a national government con-

State now, except where they were done in aid of that rebellion, or are in conflict with the Constitution and laws of the United States, or were intended to impeach its authority.

"In *Texas v. White*, 7 Wall. 700, the first and important question was whether Texas was then one of the United States, and as such capable of sustaining an original suit in this court by reason of her being such State. And this was at a time when Congress had not permitted her, after the rebellion, to have representatives in either house of that body. Mr. Chief-Justice Chase, in delivering the judgment of the court on this question, says: 'The ordinance of secession adopted by the Convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null; they were utterly without operation in law. The obligations of the State as a member of the Union, and of every citizen of the State as a citizen of the United States, remained perfect and unimpaired. It follows that the State did not cease to be a State, nor her citizens to be citizens of the Union. If this were otherwise, the State must have become foreign, and her citizens foreigners; the war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest and subjugation. Our conclusion, therefore, is, that Texas continued to be a State, and a State of the Union, notwithstanding the transactions to which we have referred.' *Miller, J., Keith v. Clark*, 7 Otto, 454, 461.

tended that coercion of a State was not impracticable, and had been resorted to both in ancient and modern times. The advantage remained, as might have been anticipated, with the advocates of a national government. Men preferred a system under which war would not occur unless provoked by insurrection, where order would be maintained and the taxes collected by a marshal or constable armed with a writ, and not by a corporal at the point of the bayonet. To treat this as a proof that the National Government cannot resort to force in aid of the law, is inconsistent not only with all that was said in the Federal Convention, but with the tenor of the debates in the conventions called subsequently in the States. That the use of force in the last resort is necessary to give a sanction to law, and above all to the organic law on which all else depends, was not denied by any disputant on either side. The only question was whether coercion should be applied to the States as such, or directly to individuals. Among other proofs may be noticed the following remarks of Mr. Ellsworth in the Convention of Connecticut, which not only give a correct definition of the Government of the United States, but show a prophetic insight seldom evinced by any man.

“This Constitution defines the extent of the powers of the General Government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their power, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void. On the other hand, if the States make a law which is a usurpation upon the General Government, the law is void, and upright independent judges will so declare. Still, if the United States and independent States will quarrel, if they wish to fight, they may do it, and no form of government can possibly prevent that. It is sufficient for this Constitution that so far from laying them under a necessity of contending, it provides every reasonable check against it. But perhaps at some time or other there will be a contest, the States will rise against the General Government. If this

does take place, if all the States combine, if all oppose, the whole will not eat up the members, but the measure which is opposed to the sense of the people will prove abortive. In republics it is a fundamental principle that the majority govern, and that the minority comply with the general voice. How contrary, then, to republican principles, how humiliating is our present situation! A single State can rise up and put a veto upon the most important public measure. We have seen this actually take place. So far is this from being consistent with republican principles, that it is in effect the worst species of monarchy.

“Hence we see how necessary for the Union is a coercive principle. No man pretends the contrary; the only question is, Shall it be a coercion of law, or a coercion of arms? There is no other possible alternative. Where will those who oppose a coercion of law come out; where will they end? A necessary consequence of their principles is a war of the States one against the other. I am for coercion by law,—a coercion which acts only upon delinquent individuals. The Constitution does not attempt to coerce sovereign bodies,—States in their political capacity. No coercion is applicable to such parties but that of an armed force. If we should attempt to execute the laws of the Union by sending an armed force against a delinquent State, it would involve the good and the bad, the innocent and guilty, in the same calamity. But this legal coercion singles out the guilty individual and punishes him for breaking the laws of the Union.” Governor Huntington, following on the same side, declared that “no nation could exist without a coercive power,—a power to enforce its political regulations.”

I might cite other instances from the debates in Pennsylvania and Virginia; but these are enough to show that the question was not between coercion and non-coercion, but whether the coercive force, which all agreed to be essential, should be applied to the States or directly to individuals.<sup>1</sup>

<sup>1</sup> See *Texas v. White*, 7 Wall. 700; *Thorington v. Smith*, 8 Id. 1; *Williams v. Bruffy*, 96 U. S. 176; *Keith v. Clark*, 97 U. S. 570; *Poin-dexter v. Greenhow*, 114 Id. 270, 290.

The advocates of a merely Federal Union favored the former method, because it would leave the several States free to array their citizens against the General Government without exposing them to the penalties incident to treason ; while the latter was as strenuously maintained by the friends of the Constitution as the one effectual means through which the guilty would be singled out and chastised without inflicting punishment on the innocent. .

It was by ignoring this distinction, which should have been familiar to him as a Federalist, that Mr. Buchanan arrived at the pusillanimous conclusion in his Message of Dec. 3, 1860, that because the Constitution did not in terms provide for the contingency of secession, or expressly authorize the coercion of a State, the Government was powerless to reduce the inhabitants of the seceding States to obedience.<sup>1</sup> The error

<sup>1</sup> " The question, fairly stated, is: Has the Constitution delegated to Congress the power to coerce a State into submission which is attempting to withdraw, or has actually withdrawn, from the confederacy? If answered in the affirmative, it must be on the principle that the power has been conferred upon Congress to declare and to make war against a State. After much serious reflection I have arrived at the conclusion that no such power has been delegated to Congress or to any other department of the Federal Government. It is manifest, upon an inspection of the Constitution, that this is not among the specific and enumerated powers granted to Congress; and it is equally apparent that its exercise is not 'necessary and proper for carrying into execution' any one of these powers. So far from this power having been delegated to Congress, it was expressly refused by the Convention which framed the Constitution.

"It appears from the proceedings of that body that on the 31st of May, 1787, the clause '*authorizing an exertion of the force of the whole against a delinquent State*' came up for consideration. Mr. Madison opposed it in a brief but powerful speech, from which I shall extract but a single sentence. He observed: 'The use of force against a State would look more like a declaration of war than an infliction of punishment, and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound.' Upon his motion the clause was unanimously postponed, and was never, I believe, again presented. Soon afterwards, on the 8th of June, 1787, when incidentally adverted to the subject, he said: 'Any government for the United States formed on the supposed practicability of using force against the unconstitutional proceedings of the States, would prove as visionary and fallacious

is the less excusable because his distinguished predecessor Jackson had, in the vigorous proclamation which forms a turning point in our history, clearly shown that the Constitution is a frame of government, and that every government may, by virtue of the inherent right of self-defence, enforce its laws, and punish those who disobey.

This covers the whole ground, and renders the inquiry whether the Constitution contemplates the coercion of a State as an organic whole, of little moment, because such a compulsion is not requisite to the maintenance of the Union or the performance of its functions, except it may be that of guaranteeing a republican form of government to the several States. So long as the inhabitants of South Carolina paid their taxes and submitted in all other respects to the laws made by Congress as expounded by the national tribunals, the only effect of an ordinance of secession would be that the State would cease to be represented in the Senate, or, if the entire population declined to elect members of Congress, in the House. The necessity for a recourse to force would not arise until the officers of the Government met with an armed resistance in the collection of revenue or the execution of the laws; and the controversy would then be simply with the insurgents, unless the State intervened, when the war would become defensive on the part of the Union, and in legal contemplation not with South Carolina, but with individuals professing to act by virtue of an authority which she

as the government of Congress,'—evidently meaning the then existing Congress of the old Confederation.

“Without descending to particulars, it may be safely asserted that the power to make war against a State is at variance with the whole spirit and intent of the Constitution. Suppose such a war should result in the conquest of a State. How are we to govern it afterwards? Shall we hold it as a province, and govern it by despotic power? In the nature of things, we could not, by physical force, control the will of the people and compel them to elect senators and representatives to Congress, and to perform all the other duties depending upon their own volition and required from the free citizens of a free State as a constituent member of the confederacy.”—Buchanan's Message, Dec. 3, 1860 · 1 Senate Doc., 36th Congress (1860-61), 11.

did not possess, and could not constitutionally delegate.<sup>1</sup> The State might ultimately be coerced; but if so it would be simply because the application of force to her citizens would in effect be a coercion of the State.<sup>2</sup>

<sup>1</sup> *Texas v. White*, 7 Wall. 700; *Thorington v. Smith*, 8 Id. 1; *Williams v. Beuffy*, 96 U. S. 176; *Keith v. Clark*, 97 U. S. 454, 465; *Poin-dexter v. Greenhow*, 114 Id. 270, 290.

<sup>2</sup> The author of the proclamation was perhaps unconsciously led by the necessity of the case into the line of argument which had been employed by Jefferson in a letter of April 16, 1781, to Madison, to show that the Confederation had notwithstanding the absence of an express authority to that effect, the power and right of coercion. "It has been so often said, as to be generally believed, that Congress have no power by the Confederation to enforce anything; for example, contributions of money. It was not necessary to give them that power expressly; they have it by the law of nature. When two parties make a compact, there results to each a power of compelling the other to execute it. Compulsion was never so easy as in our case, — where a single frigate would soon levy on the commerce of any State the deficiency of its contributions, — nor more safe than in the hands of Congress, which has always shown that it would wait, as it ought to do, to the last extremities before it would exercise any of its powers which are disagreeable.

"It may be asked, perhaps, by what means Congress could exercise such a power, if the States were to invest them with it. As long as there is a regular army on foot, a small detachment from it, acting under civil authority, would at any time render a voluntary contribution of supplies due from a State an eligible alternative. But there is a still more easy and efficacious mode. The situation of most of the States is such that two or three vessels of force employed against their trade will make it their interest to yield prompt obedience to all just requisitions on them. With respect to those States that have little or no foreign trade of their own, it is provided that all inland trade with such States as supply them with foreign merchandise may be interdicted; and the concurrence of the latter may be enforced in case of refusal by operations on their foreign trade." 11 *Jefferson's Writings*, 203; 1 *Rives' Madison*, 303.

No other refutation is needed of the argument by which Mr. Buchanan sought to exonerate himself before the world, and perchance to his own conscience. 1 *Rives' Madison*, 304.

## LECTURE V.

The Nature of the United States Government (*continued*): Its indefeasibility. — Secession, according to the State-Rights Opponents of the Constitution, equivalent to Treason. — The Doctrine of Calhoun. — *Contemporanea expositio est optima et fortissima in lege*. — The Supremacy of the National Government urged in the State Conventions as an Objection to the Constitution. — Henry and Mason in the Virginia Convention; Findlay in the Pennsylvania Convention; Martin's Address to the Maryland House of Delegates; Discussion and Denial of the Right of Secession in the Conventions of New York and Virginia.

It results from what has been said that the advocates of State-rights in the Convention agreed with the national party in conceding many of the attributes of sovereignty to the General Government, including that of employing force to compel obedience, which necessarily implied that the Union was, as the Articles of Confederation had declared, perpetual, and one which its subjects, whether States or citizens, could not rightfully dissolve. Obviously a right on the part of the Union to coerce a State is practically, if not logically, incompatible with a right on the part of the State to withdraw from the Union; because the advance of the federal troops would otherwise be a signal for the passage of an ordinance of secession that would put an end to the jurisdiction which the Government was seeking to enforce.

The difference between the two methods was not as to the right of the General Government to compel obedience, — which was universally regarded as indispensable, — but whether the inhabitants of the State might repel force by force, or would be bound to submit and liable to be treated as rebels if they took up arms. The latter alternative was adopted, notwithstanding the dissent of some of the members of the Conven-

tion, and a desire on their part to establish the principle that a citizen cannot be guilty of treason by obeying his State, although her command is to levy war against the country as a whole.

The third section of the third article accordingly provides that "Treason against the United States shall consist in levying war against them or in adhering to their enemies, giving them aid or comfort." An attempt to subvert the government of the United States by force of arms is obviously treason under this article, though made in pursuance of an ordinance of secession or other law enacted by a State.<sup>1</sup> Such was the view taken by one of the most strenuous advocates of State-rights, Luther Martin, and urged by him as a conclusive argument against the adoption of the Constitution. "If," said he, "a State has recourse to the sword in order to preserve itself from the oppression of the General Government, the proposed form of government declares that the State and every one of its citizens who acts under its authority are guilty of a direct act of treason. The States are therefore reduced to this alternative, — they must tamely and passively yield to despotism, or their citizens must oppose it at the hazard of the halter. If they obey the authority of their State Government, they are guilty of treason against the United States; if they join the General Government, they are guilty of treason against their own State." He had, therefore, suggested as an amendment: "That no act or acts done by one or more of the States against the United States, or by any citizen of any one of the United States under the authority of one or more of the said States, shall be deemed treason or punished as such; but in case of war being levied by one or more of the States against the United States, the conduct of each party towards the other, and their adherents respectively, shall be regulated by the laws of war and of nations." But this provision was rejected, as being too much opposed to the main object of many of the leading members of the Con-

<sup>1</sup> See Jackson's Proclamation, 4 Elliott's Debates (2d ed., Phila., 1876), 59; 4 Madison's Writings, 421.

vention, which was, in Mr. Martin's opinion, to leave the States at the mercy of the General Government.<sup>1</sup>

Luther Martin's argument would be a convincing proof, though there were no other, that, agreeably to the true intent and meaning of the Constitution, the Government of the United States is indefeasible as well as paramount, and war against it not less an act of treason because sanctioned by a State or levied at her command.

It is equally true and entirely consistent with the proposition that an illegal act—as, for instance, quartering soldiers on the citizen in time of peace, or subjecting him to fine or imprisonment without due process of law—may be resisted without incurring the penalties of treason, although the wrong is done in pursuance of a law made by Congress or the President's command, and cannot be effectually repelled without a conflict with the forces of the General Government. Such resistance is not levying war against the United States within the meaning of the Constitution. For as the Government of the United States is confined to certain limits, a man who goes beyond them is not less a trespasser because he holds an official position or relies on an invalid order or enactment. Such is the well-established rule of the common law, and one without which liberty cannot well be secure in any land. But the legal standard in such cases is the Constitution as interpreted by the Supreme Court, and a State law or ordinance cannot vary the question or authorize resistance where the right would not otherwise exist.<sup>2</sup>

<sup>1</sup> Luther Martin's address to the Maryland House of Delegates, 2 Elliott's Debates (2d ed., Phila., 1876), 586.

<sup>2</sup> Force used, not to overthrow the government, but to keep its servants within proper limits and oppose the execution of an illegal order, is not treason at common law or under the statute of Edward I., even when it results in an armed conflict with the officers of the law or with the troops called out for their support. So the service of an informal writ, or one issued in a matter where the court has no jurisdiction, may be forcibly resisted; and if the constable is slain in the affray, it is not murder. 1 Smith's L. C. (8th Am. ed.), 1111, 1140, 1146; *Howard v. Gosset*, 10 Q. B. 359, 387, 437, 452; *The Case of the Marshalsea*, 10 Coke, 68, 76. It was on this ground that Lord Chatham vindicated the resistance

It is singular, but can hardly be deemed surprising, that the political descendants of the men who in 1787 could see nothing federal in the Constitution, and based their objection to it on the ground that it merged the States in a consolidated government, should be convinced that this view was erroneous, and that the Government of the United States is a mere compact or alliance that may be dissolved at pleasure. The Constitution as delineated by Luther Martin, Patrick Henry, Lansing, and the other opponents of the measure in the last century, stands in such marked contrast to the doctrine of Calhoun and his disciples in this, that it would be inconceivable that men so much alike, and having the same political views, could put such different interpretations on the same instrument, were it not obvious that the sentiment of uncompromising hostility, which prompted the allegation that the new government would be absolute, in the hope of preventing its adoption, led to the denial of its sovereignty after it had been established, with a view to effect its overthrow. These extreme views refute each other; and need only be thrown into the same crucible to evolve the truth that within the scope of their powers the United States are as sovereign as Parliament, although a wide field of usefulness lies open beyond these limits to the States.

We have the authority of Lord Coke for saying, *Contemporanea expositio est optima et fortissima in lege*; and although the

of America, as dictated by the spirit which had from of old opposed forced loans, benevolences, and ship-money.

“If the king’s servants will not present a constitutional question to be decided according to the principles and forms of the Constitution, then it must be decided in some other manner; and rather than it should be given up, rather than the nation should surrender their birthright to a despotic minister, I hope, my lords, old as I am, I shall see the question brought to issue fairly between the people and the Government. I have been bred up in these principles, and know that when the liberty of the subject is invaded, and all redress is denied him, resistance is justified. My lords, this is not the language of faction; let it be tried by that criterion by which alone we now distinguish faction and what is not, — by the principles of the English Constitution. . . . Were I an American, as I am an Englishman, while a foreign troop was landed in my country I would never lay down my arms, never, never, never!”

language held in debate cannot vary the effect of a statute, still, when a measure is political and admits of two interpretations, that view should be preferred which was taken at the time, and on the faith of which it was adopted. Applying this test to the Constitution, we shall find that its opponents went farther than its advocates in contending that the Union would, if established, be sovereign and indefeasible, and form a bond from which there would be no escape. It was on this basis that the government was presented to the people, accepted by them, put in operation by its founders, and has worked successfully for well-nigh a hundred years; and it should be regarded as indisputable even by those who believe that it was originally incorrect.

The proceedings of the State Conventions are more significant in this regard than those of the assembly which devised the Constitution, because they were the enacting power, while it was merely advisory. Moreover, the State Conventions sat with open doors, and were better guides and exponents of public opinion than was the Federal Convention, which set the seal of secrecy on its debates by a resolution that "nothing spoken in this house shall be printed, published, or otherwise communicated." Among these assemblies none is more deserving of attention than the Virginia Convention, which from the reputation and ability of the delegates and the extent and population of the State, had a decisive influence on the course of events. When that body assembled, Patrick Henry, who was the acknowledged leader of the opposition, called for the "Act of Assembly appointing deputies to meet at Philadelphia to revise the Articles of Confederation, and other public papers relative thereto." Mr. Pendleton, who had been placed in the chair, said that they were not there to inquire whether the Federal Convention had exceeded its powers. Although the delegates to that body were only directed to consider the defects of the old system, and not to devise a new one, still, if they found it so thoroughly defective as not to admit of revision, and submitted a new system which the people had deputed them to investigate, he could not see any degree of propriety in reading the papers in

question.<sup>1</sup> In other words, the question was not, had the delegates deviated from the strict line of their instructions in framing the Constitution, but would the popular will approve and ratify their act.

The Convention then proceeded to consider the Constitution "clause by clause;" and the clerk having read the preamble and first article, Mr. Nicholas opened the debate by a speech in favor of ratification. Patrick Henry rose in reply, and with the acumen of a man versed in legislative and forensic discussion, directed his attack to that portion of the preamble which describes the Constitution as established by the people of the United States. "And here," said he, "I would make this inquiry of those worthy characters who composed a part of the late Federal Convention. I am sure they were fully impressed with the necessity of forming a great consolidated government instead of a confederation. That this is a consolidated government is demonstrably clear; and the danger of such a government is to my mind very striking. I have the highest veneration for those gentlemen; but, sir, give me leave to demand what right had they to say 'WE THE PEOPLE'? My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask who authorized them to speak the language of We the People, instead of We the States? States are the characteristics and the soul of a confederation. If the States be not the agents of this compact, it must be one great consolidated national government of the people of all the States."

On the following day, June 5, 1788, Patrick Henry reiterated and enforced the argument which he had made at the opening of the debate. "I rose yesterday," said he, "to ask a question which arose in my mind. When I asked that question, I thought the meaning of my interrogation was obvious. The fate of this State and of America may depend on this. Have they said, We the States? Have they made a proposal of a compact between States? If they had, this would be a confederation. It is otherwise most clearly a con-

<sup>1</sup> 3 Elliott's Debates (2d ed., Phila., 1876), 6.

solidated government. The question turns, sir, upon that poor little thing, the expression, ‘We the People,’ instead of ‘We the States,’ of America. I need not take much pains to show that the principles of this system are extremely pernicious, impolitic, and dangerous. Is this a confederacy like Holland, — an association of a number of States, each of which retains its individual sovereignty? Is this a monarchy like England, — a compact between prince and people, with checks on the former to secure the liberty of the latter? It is not a democracy, wherein the people retain all their rights securely. Had these principles been adhered to, we should not have been brought to this alarming transition from a confederacy to a consolidated government. We have no detail of those great considerations, which in my opinion ought to have abounded before we should recur to a government of this kind. Here is a revolution as radical as that which separated us from Great Britain. It is radical in this transition. Our rights and privileges are endangered, and the sovereignty of the States will be relinquished; and cannot we plainly see that this is actually the case? . . . The honorable gentleman’s observations respecting the people’s right of being the agents in the formation of this government are not accurate, in my humble conception. The distinction between a national government and a confederacy is not sufficiently discerned. Had the delegates who were sent to Philadelphia a power to propose a consolidated government instead of a confederacy? Were they not deputed by States, and not by the people? The assent of the people in their collective capacity is not necessary to the formation of a federal government. The people have no right to enter into leagues, alliances, or confederations; they are not the proper agents of this kind of government. Show me an instance where the people have exercised this business. Has it not always gone through the legislatures? I refer you to the treaties with France, Holland, and other nations. How were they made? Were they not made by the State? Are the people, therefore, in their aggregate capacity the proper persons to form a confederacy? This, therefore, ought to depend on the consent of the legis-

latures, the people having never sent delegates to make any proposition for changing the government.<sup>1</sup>

“By the resolve of the Convention this Constitution is not to be ratified by the legislatures of the respective States, but is to be submitted to conventions chosen by the people, and if ratified by them, is to be binding. . . . I was of opinion that the States, considered as States in their political capacity, are the members of the Federal Government; that the States in their political capacity, or as sovereignties, are entitled, and solely entitled, originally to agree upon the form of, and submit themselves to a federal government, and afterwards by mutual consent to dissolve or alter it; that everything which relates to the formation, the dissolution, or the alteration of a federal government over States equally free, sovereign, and independent, is the peculiar province of the States in their sovereign or political capacity, in the same manner as what relates to forming alliances or treaties of peace, amity, or commerce, and that the people at large in their individual capacity have no more right to interfere in the one case than in the other; that according to these principles we originally acted in forming our confederation. It was the States as States, by their representatives in Congress, that formed the Articles of Confederation; it was the States as States, by their legislatures, who ratified those Articles; and it was then established and provided that the States as States (that is, by their legislatures) should agree to any alterations that should thereafter be proposed in the Federal Government before they should be binding; and any alterations agreed to in any other manner cannot release the States from the obligation they are under to each other by virtue of the original Articles of Confederation. The people of the different States never made any objection to the manner in which the Articles of Confederation were formed or ratified, or to the mode by which alterations were to be made in that government. With the rights of their respective States they wished not to interfere; nor do I believe the people in their individual capacity would ever have expected or desired to have been appealed

<sup>1</sup> 3 Elliott's Debates, 44.

to on the present occasion, in violation of the rights of their respective States, if the favorers of the proposed Constitution, imagining they had a better chance of forcing it to be adopted by a hasty appeal to the people at large (who could not be so good judges of the dangerous consequences), had not insisted upon this mode. Nor do these positions in the least interfere with the principle that all power originates from the people; because when once the people have exercised their power in establishing and forming themselves into a State government it never devolves back to them, nor have they a right to resume or again to exercise that power until such events take place as will amount to a dissolution of their State government.”<sup>1</sup>

A similar criticism was levelled by George Mason at the clause conferring the power to levy “taxes, duties, and imposts,” as conferring a power at variance with the sovereignty of the States, and that might be used to render it ineffectual, by drawing all the available funds of the community into the coffers of the General Government.

“Whether the Constitution,” said he, “be good or bad, the present clause clearly discovers that it is a national government, and no longer a confederation. I mean that clause which gives the first hint of the General Government laying direct taxes. The assumption of this power of laying direct taxes does of itself entirely change the Confederation of the States into one consolidated government. This power, being at discretion, unconfined, and without any kind of control, must carry everything before it. The very idea of converting what was formerly a confederation to a consolidated government, is totally subversive of every principle which has hitherto governed us.

“This power is calculated to annihilate totally the State governments. Will the people of this great community submit to be individually taxed by two different and distinct powers? Will they suffer themselves to be doubly harassed? These two concurrent powers cannot exist long together; the one will destroy the other. The General Government being para-

<sup>1</sup> See Luther Martin’s Address to the Maryland House of Delegates, 1 Elliott’s Debates (2d ed., Phila., 1876), 387.

mount, and in every respect more powerful than the State governments, the latter must give way to the former."

The arguments used on either side in the course of these debates are a convincing proof that the supporters of the Constitution did not seek to disguise the magnitude of the change involved, and, on the contrary, laid the question nakedly before the country in words that could not be misunderstood.

It was objected during the debate on the eighth section of the first article that Congress had the power of taxation, and to raise and supply armies and declare war; that the clauses under consideration also gave them the power to organize, arm, and discipline the militia, and call them forth to repel invasion and suppress insurrections; and that the President was commander-in-chief of the land and naval forces of the United States and of the militia when in actual service. The United States Government would consequently hold both "the purse and the sword," and be in effect absolute, while the States would be unarmed and defenceless, and would succumb if assailed by the General Government. It was not and could not be denied by the speakers on the other side that these powers were conferred by the Constitution, nor that there was a possibility of abuse; but they were vindicated as essential to the strength and efficiency of a government charged with the duty of providing for the common defence and general welfare. Patrick Henry saw the opening given by his opponents, and took up the glove with an eagerness not untinged with exultation. "Mr. Chairman," said he, "it is now confessed that this is a national government. There is not a single federal feature in it. It has been alleged during the debates to be both federal and national; but when we have the definition of it, it is purely national."<sup>1</sup> It will hardly be contended, in view of this language, that the question, federal or national, was not squarely before the Convention, or that the Constitution was adopted without full notice that the choice lay between the strength of a national organization, and the weakness and instability incident to a league of States.

<sup>1</sup> 3 Elliott's Debates (2d ed., Phila., 1876), 395.

Like ground was taken in other States by the opponents of the Constitution, and measurably conceded by its friends, although they did not admit that consolidation was carried so far as entirely to obliterate the States.

Thus Mr. Findlay contended in the Pennsylvania Convention that "the proposed plan of government amounted to a consolidation, and not a confederation, of the States." Mr. Wilson had admitted that if this was a just objection, it would be strongly against the system; and so, it seemed, did all its advocates, from the subsequent silence upon that subject — except Dr. Rush, who, on Monday, insinuated that he saw and rejoiced at the eventual annihilation of the State sovereignties' position. He (Mr. Findlay) then argued that the proposed Constitution established a general government and destroyed the individual governments, from the following evidence taken from the system itself.

"*First.* — In the preamble it is said, *We the people*, and not *We the States*; which, therefore, is a compact between individuals entering into society, and not between separate States enjoying independent power, and delegating a portion of that power for their common benefit.

"*Second.* — That in the legislature each member has a vote; whereas in a confederation, as we have hitherto practised it, and from the very nature of the thing, a State can only have one voice, and therefore all the delegates of any State can only give one vote.

"*Third.* — The powers given to the federal body for imposing internal taxation will necessarily destroy the State sovereignties; for there cannot exist two independent sovereign taxing powers in the same community, and the stronger will of course annihilate the weaker.

"*Fourth.* — The power given to regulate and judge of elections is a proof of a consolidation; for there cannot be two powers employed at the same time in regulating the same elections; and if they were a confederated body, the individual States would judge of elections, and the general Congress would judge of the credentials which proved the election of its members.

“*Fifth.*— The judiciary power, which is co-extensive with the legislative, is another evidence of a consolidation.

“*Sixth.*— The manner in which the wages of the members are paid, makes another proof.

“And, lastly, the oath of allegiance directed to be taken, establishes it incontrovertibly; for it would be absurd that the members of the legislative and executive branches of a sovereign State should take a test of allegiance to another sovereign or independent body.”<sup>1</sup>

The issue was not less distinctly joined in Maryland. There Luther Martin wrote to the Speaker of the House of Delegates, describing the Constitution as a consolidation which expunged State sovereignty, and recapitulating the reasons which he and other opponents of the measure in the Federal Convention had assigned for withholding their signatures. “It was urged,” he wrote,<sup>2</sup> “that the government we were forming was not in reality a federal, but a national government, not founded on the principles of the preservation, but the abolition or consolidation, of all State governments; that we appeared totally to have forgotten the business for which we were sent, and the situation of the country for which we were preparing our system; that we had not been sent to form a government over the inhabitants of America considered as individuals; that as individuals they were all subject to their State governments, which governments would still remain, though the federal government should be dissolved; that the system of government we were intrusted to prepare was a government over these thirteen States; but that in our proceedings we adopted principles which would be right and proper only on the supposition that there were no State governments at all, but that all the inhabitants of this extensive continent were in their individual capacity without government, in a state of nature; that, accordingly, the system proposes a legislature to consist of two branches, the one to be drawn from the people-at large in their individual capacity, the other to be chosen in a more select manner, as a check upon the first.

<sup>1</sup> See the Independent Gazetteer, Dec. 7, 1787.

<sup>2</sup> 1 Elliott's Debates (2d ed., Phila., 1876), 360.

“It is in its very introduction declared to be a compact between the people of the United States as individuals, and it is to be ratified by the people at large in their capacity as individuals, — all which, it was said, would be quite right and proper if there were no State governments, if all the people of this continent were in a state of nature, and we were forming one national government for them as individuals; and is nearly the same as was done in most of the States when they formed the governments over the people who composed them. Whereas it was urged that the principles on which a federal government over States ought to be constructed and ratified are the reverse, and instead of the legislature consisting of two branches, one branch was sufficient, whether examined by the dictates of reason or the experience of ages; that the representation, instead of being drawn from the people at large as individuals, ought to be drawn from the States as States in their sovereign capacity; that in a federal government the parties to the compact are not the people as individuals, but the States as States; and that it is by the States in their sovereign capacity that the system of government ought to be ratified, and not by the people as individuals.<sup>1</sup>

“It was insisted that in the whole system there was but one federal feature, — the appointment of the Senators by the States in their sovereign capacity (that is, by their legislatures), and the equality of suffrage in that branch; but it was said that this feature was only federal in appearance. . . . Nay, so far were the friends of the system from pretending that they meant it or considered it as a federal system, that on the question being proposed, ‘that a union of the States, merely federal, ought to be the sole object of the exercise of the powers vested in the Convention,’ it was negatived by a majority of the members, and it was resolved ‘that a national government ought to be formed.’

“Afterwards the word ‘national’ was struck out by them, because they thought the word might tend to alarm; and although now they who advocate the system pretend to call

<sup>1</sup> 1 Elliott's Debates (2d ed., Phila., 1876), 360.

themselves Federalists, in convention the distinction was quite the reverse: those who opposed the system were there considered and styled the Federal party; those who advocated it, the Anti-Federal."<sup>1</sup>

This reasoning seems to be incontrovertible. If the people were the authors of the government, it was not constituted by the States, and is a union of men to form a nation, as distinguished from a confederacy.<sup>2</sup> It is also evident that the point did not pass unchallenged, but was, on the contrary, regarded by both parties as one of the first importance, and decisive of the relation which the new government would bear to the States and to the people.

The language held in the Virginia Convention, in New York, and Pennsylvania, and indeed wherever the ratification of the Constitution became the theme of controversy, has an important bearing on another point, which, though taken for granted then, arose subsequently, and gave rise to the late civil war. I allude to the alleged right to dissolve the Union by an ordinance of secession. The eloquent declamation of Patrick Henry was absurdly out of place if the Constitution was an airy nothing, — a bubble that might be blown away by the first breath of disaffection, and Virginia could, by merely signifying her intention, withdraw her neck from the yoke, which he described as one of steel.<sup>3</sup> The whole tenor of his argument implies that the choice, once made, would be irrevocable, and impose fetters that could not be unloosed. "This paper" (that is, the Constitution), said Mr. Mason, in his place in the Virginia Convention, "will be the great charter of America; it will be paramount to everything. After having once consented to it, we cannot recede from it;" and the argument was urged as an unanswerable one for caution and delay.<sup>4</sup>

<sup>1</sup> 1 Elliott's Debates (2d ed. Phila., 1876), 360.

<sup>2</sup> Luther Martin's Address to the Maryland House of Delegates, 1 Elliott's Debates, 359.

<sup>3</sup> See Jackson's Proclamation of Nov. 24, 1832; 4 Elliott's Debates (2d ed., Phila., 1876), 586.

<sup>4</sup> 3 Elliott's Debates, 502.

They who contend that although the right of secession was not conferred in terms, it is necessarily implied, and was so understood at the time, have to meet two difficulties,— first, how a government which was to be a mere agency that might be terminated at any moment, should have been regarded with so much expectation by one party, and with so much apprehension by the other; and next, why, if such a right was desirable in the opinion of the delegates, and would have been sanctioned by the popular judgment, it was not expressly given in the body of the instrument, or by the amendments which were made soon afterwards, in accordance with the general wish. These considerations would seem to be decisive. So far from the Constitution having been adopted in the belief that the States might secede at pleasure, such a provision would have been viewed with universal disfavor, as tending to perpetuate a danger against which all parties sedulously desired to guard, and would have insured the rejection of any plan of which it was expressly or impliedly a part.<sup>1</sup>

The nation was weary of anarchy, and wanted repose; and while men differed as to certain points, they all agreed that the new government should be stable, and have the elements requisite to endurance. If any doubt existed on this head, it would be removed by the proceedings in New York. The opponents of the Constitution were there so largely in the majority that success seemed hopeless; and it was proposed, by way of compromise, that the ratification should be conditional, depending on the passage of certain amendments, with a right of withdrawal within a limited period if the condition were not fulfilled. The suggestion was specious, because it implied that there would be no power to secede, aside from the condition, and that the obligation would be absolute if the amendments were adopted. Hamilton seems to have wavered, and consulted Madison, who replied “that the reservation of a right to withdraw if the amendments be not decided upon under the forms of the

<sup>1</sup> 2 Rives' Madison, 608, notes, p. 627.

Constitution, within a certain time, is a conditional ratification that does not make New York a member of the new Union, and consequently that she could not be received on that plan. The idea of reserving a right to withdraw was started at Richmond, and considered as a conditional ratification which was abandoned as worse than a rejection."<sup>1</sup>

The argument had the weight which it deserved, and the friends of the Constitution resolved to consent to no terms which would endanger the stability of the new government on which they had set their hopes. After a prolonged debate, in which Jay, Hamilton, and Chancellor Livingston participated, Melancton Smith, who led on the other side, moved that the Constitution be ratified, "upon condition, nevertheless, that until a second general convention be convened for proposing amendments to the Constitution, certain powers therein conferred should not be exercised save with the restrictions and limitations prescribed in the act of ratification."

An earnest discussion followed, and lasted for several days, varied by a motion to adjourn *sine die*, which was rejected; and it was then resolved, on the motion of Mr. Jones, that the words "on condition" should be stricken out, and "in full confidence" substituted. Mr. Lansing finally raised the direct issue, by moving that New York should reserve "a right to withdraw herself from the Union after a certain number of years, unless the amendments should previously be submitted to a general convention." The motion was lost, and the Constitution ratified unconditionally in the mode proposed by Mr. Jones, which expressed an expectation that did not form part of the contract, or render it less obligatory.<sup>2</sup>

The course of events in Virginia is not less instructive. The question whether the momentous change involved should be irrevocable, was present to every reflecting mind, and Richard Henry Lee wrote to Mason, urging that Virginia should reserve a right of withdrawal. This proposal was so

<sup>1</sup> 2 Rives' Madison, 627.

<sup>2</sup> 2 Elliott's Debates (2d ed., Phila., 1876), 111, 112.

contrary to the sentiments of the Convention that no one ventured to bring it forward; and a strenuous effort to make the ratification conditional having failed, the Constitution was, as I have elsewhere stated, adopted unconditionally, with a declaration that its powers were derived from the people of the United States, and might be resumed by them if abused,—which implied that they did not come from the States, and that a State could not secede from a government which was founded on national consent, and could only be dissolved by the power that had called it into being.<sup>1</sup>

The notion that the Constitution was ratified conditionally is as unfounded in the case of the other States as it is with regard to Virginia and New York. Various amendments were indeed suggested as desirable and important. Of these some were adopted after the government went into operation, and others dismissed. But none of them, directly or indirectly, sanctioned the right of secession,—an omission almost, if not quite, as conclusive as an explicit disavowal.

While the advocates of the Constitution fairly met the issue presented by their opponents,—that it was a national government, established by the people and supreme within its sphere,—they were equally distinct in the avowal that State sovereignty would remain for local purposes, although in a qualified form. This was unequivocally stated by Madison when the Constitution was under consideration in Virginia, and with equal clearness in the Conventions of New York and Pennsylvania. In reply to a question whether the proposed government would be national or federal, Mr. Madison said: “It is, in my opinion, of a mixed nature. It is in a manner unprecedented. No express example can be found in the experience of the world. In some respects it is a government of a federal nature.”

Madison’s just and candid statement was assailed with unsparing ridicule by Patrick Henry. “We are told,” said he, “that this government, collectively taken, is without an example; that it is national in this part, and federal in that

2 Rives’ Madison, 607, 609, 627; 3 Elliott’s Debates (2d ed., Phila., 1876), 630, 656.

part, etc. We may be amused, if we please, by a treatise of political anatomy. In the brain it is national; the stamina are federal; some limbs are federal, others national. The senators are voted for by the State legislatures, — so far it is federal. Individuals choose the members of the first branch, — here it is national. It is federal in conferring general powers, but national in maintaining them. It is not to be supported by the States; the pockets of individuals are to be searched for its maintenance. What signifies it to me that you have the most curious anatomical description of it in its creation? To all the common purposes of legislation it is a great consolidation of government.

“You are not to have the right to legislate but in trivial cases; you are not to touch private contracts; you are not to have the right of having arms in your defence; you cannot be trusted with dealing out justice between man and man. What shall the States have to do? Take care of the poor, repair the highways, erect bridges, and so on, and so on. Abolish the State legislatures at once. What purposes should they be continued for? Our legislature will indeed be a ludicrous spectacle, — one hundred and eighty men marching in solemn, farcical procession, exhibiting a mournful proof of the lost liberty of their country, without the power of restoring it. But, sir, we have the consolation that it is a mixed government; that is, it may work sorely on your neck, but you will have some comfort by saying it was a federal government in its origin.

“I beg gentlemen to consider; lay aside your prejudices. Is this a federal government? Is it not a consolidated government for almost every purpose? Is the government of Virginia a State government after this government is adopted? I grant it is a republican government; but for what purposes? For such trivial domestic considerations as render it unworthy of the name of legislature.”

Like ground was taken by the opponents of the Constitution in Pennsylvania. It was said there, as it was subsequently alleged in Virginia, that the very manner of establishing the Constitution changed the principle of the Confederation, and

introduced "a consolidating and absorbing government." The sovereignty of the States was not preserved. "There could not be two sovereign powers; and a subordinate sovereignty was no sovereignty." And again, "that the proposed government was not a federal government, but a complete one, with legislative, executive, and judicial powers; it was a consolidating government." To render the ground taken by the opponents of the measure entirely clear, the delegate from Fayette County declared that he understood by a consolidated government one that would transfer the sovereignty from the State governments to the General Government. And Mr. Findlay, from Westmoreland, added: "*That* is a consolidation which puts the thirteen States into one."

To this objection Mr. Wilson gave substantially the same answer as Madison: "If when the gentleman says it is a consolidation he means so far as relates to the general objects of the Union, so far it was intended to be a consolidation; and on such a consolidation our very existence as a nation depends. If, on the other hand, he means that it will absorb the governments of the individual States, so far is this position from being admitted, that it is unanswerably controverted. The existence of the State governments is one of the most prominent features of this system."<sup>1</sup>

That Mr. Henry could not see that the States had a great and important part to play under the Constitution, may seem singular to us who view the event in the light of history; but it is not surprising that he should have feared that they would gradually lose their individuality, or be absorbed by the Government of the United States. His forebodings were unquestionably sincere. Should they also be regarded as proofs of his sagacity? Had he the prophetic insight, which enables its possessor to discern the shadow of coming events and forecast the future? Does our Government tend towards centralization? Have we reason to apprehend that State sovereignty and the guaranties which it affords to freedom will be merged in a popular despotism, ending, perchance, in the

<sup>1</sup> 2 Elliott's Debates (2d ed., Phila., 1876), 261.

dominion of a Cæsar, or of a multitude of petty tyrants bestriding the fragments of a broken empire? Such a result may seem improbable, but will assuredly ensue should the experiment, never before tried on such a scale, of democracy ruling through universal suffrage, prove unsuccessful. It is not ours to solve a problem which belongs to time; but on looking back it will be seen that his expectations were not verified by the course of events. For seventy years the balance of the Constitution was evenly maintained, two generations passing away in peace beneath its shade, and when at length the equipoise was disturbed, the offence came not from the General Government, but from a State. The Union did not assail South Carolina, it was she who sought to subvert the Union. That civil war should follow, and all that war involves, was a natural consequence. According to the theory of secession, the States reverted to a state of nature, and the weaker had no right to complain of the use of force. In the language of a member of the South Carolina Convention, the roof beneath which they had so long reposed was gone. If necessity became the law, and danger roused the instinct of self-preservation, the cause was not the strength of the federal bond, but the seeming weakness which induced the belief that it might be broken with impunity. Under such circumstances nice Constitutional restraints will be disregarded by both the contending parties and on either side of the line; *peccetur intra Iliacos muros et extra*; and a Hampden or a Fairfax will resort to martial law as readily as a Rupert or a Goring.

The ingenious and eloquent writer who acted as Vice-President of the Confederate States during the late rebellion asks in a recent publication why, if the Constitution is national, did those by whom it was supported assume the name of Federalists? The answer is obvious. It was not, as Mr. Stephens would intimate, because the government of the United States was a mere confederacy, but because it was unjustly reproached with going to the other extreme. The object was to put the argument of Mr. Madison in a popular form, and show that if the new government was clothed with

sufficient powers to protect the nation, there was still room for the rights of the States. The question is not new, it dates from the last century ; but it was then asked in a very different sense. The inconsistency, as then alleged, was that men who had framed and were seeking to establish a national government should conceal their object under the name of Federalists.<sup>1</sup>

Thus Mr. Smith, in the Convention of New York, declared that he was pleased that "the gentleman who opened the debate on the other side had shown that the intent of the Constitution was not a confederacy, but a reduction of all the States into a consolidated government. He hoped the gentleman would be complaisant enough to exchange names with those who disliked the Constitution, as it appeared from his own concession that they were Federalists, and those who advocated it were anti-Federalists." The answer to this observation has already been given, — that while the Government of the United States acts directly on individuals, and is as national in its operation as if there were no States, the States retain a sovereignty which, though qualified by the supremacy of the federal tribunals, and subject to the power of amendment vested in three fourths of the States, is yet real, and covers the greater part of the concerns of every day life and business. The double aspect of the General Government was shown by Mr. Wilson, in the Convention of Pennsylvania. He asked on what principle it was contended that sovereign power resided in the State governments. The honorable gentleman from Fayette had said truly that there could be no subordinate sovereignty. If so, his position was, that sovereignty resided in the people. In the Constitution all authority was derived from them. The people had hitherto been shut out of the federal government ; but it was not meant that they should any longer be dispossessed of their rights. In order to recognize this leading principle, the proposed system set out with the declaration that its existence depended upon the supreme authority of the people

<sup>1</sup> Luther Martin's letter to the Speaker of the Maryland House of Delegates.

alone. Much had been said about a consolidated government. If by this gentlemen meant such a government as would absorb and destroy the government of the several States, the plan under consideration was not a consolidated government.

## LECTURE VI.

The Nature of the United States Government (*continued*). — Significance of the Preamble, "We the People." — Who were the Parties to the Constitution. — The Government established by the People of the States acting in their Sovereign Capacity as the People of the United States.

IN considering a government which, like that of the United States, is founded on consent, it is obviously material to ascertain by whom the grant was made, and in whose favor it is designed to operate.

Accordingly, the question, Who were the parties to the Constitution? has been the theme of earnest and sometimes bitter controversy. On this point the instrument speaks for itself: "We the people of the United States," so runs the preamble, "in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution of the United States of America."

No clause in the Constitution is more significant than this, or throws a clearer light on the intention of the instrument. It is, as it was meant to be, an explicit declaration that the government under which we live proceeded not from the States, but from the nation, which, having come into existence through the War of Independence, was resolved to perpetuate what it had so hardly won. The necessity for going behind the States, and obtaining a paramount grant from the people, had been early seen by the sagacious minds that were employed in devising a remedy for the manifold evils of the existing system, and in February, 1787, Madison wrote to Jefferson: "It will be expedient in the first place to lay the foundation in such a ratification of the people themselves of

the several States as will render it clearly paramount to their authorities.”<sup>1</sup>

This idea was kept steadily in view throughout the proceedings of the National Convention, and finally resulted in a conviction that the only sure basis for the new government was the authority of the people of the United States. Thus Gouverneur Morris, on the 23d of July, said, in reply to Mr. Ellsworth, that if the Confederation was to be pursued, no alteration could be made without the unanimous consent of the legislatures. Legislative alterations not conformable to the federal compact would clearly not be valid; the judges would consider them null and void. Whereas in the case of an appeal to the people of the United States, the supreme authority, the federal compact may be altered by a majority of them, in like manner as the constitution of a particular State may be altered by a majority of the people of the State. Mr. Madison, following on the same side, considered the difference between a system founded on the legislatures only, and one founded on the people, to be the true difference between a league, or treaty, and a constitution. The former in point of moral obligation might be as inviolable as the latter. In point of political operation there were two important distinctions in favor of the latter. First, a law violating a treaty ratified by a pre-existing law might be respected by the judges as a law, though an unwise or perfidious one. A law violating a constitution established by the people themselves, would be considered by the judges as null and void. Secondly, the doctrine laid down in the law of nations in the case of treaties is, that a breach of any one article by any of the parties frees the other parties from their engagements. In the case of a union of people under one constitution, the nature of the pact has always been understood to exclude such an interpretation.<sup>2</sup>

We have here the clew to the object of the preamble. It was to exclude the idea of a league or compact be-

<sup>1</sup> History, etc., by Jno. C. Hamilton, iii. 249.

<sup>2</sup> 5 Elliott's Madison (Phila., 1876), 355, 356.

tween States, which subsequently became the pretext for secession.<sup>1</sup>

The weight of this consideration is so great that an attempt has been made to escape from it on the ground that the language of the Constitution is at variance with the facts, and that if we consult history it will appear that the Convention was composed of delegates chosen by and representing the States; that their deliberations were conducted on this basis, and that each delegation voted as a unit, without regard to population; that the plan finally agreed on was submitted to

<sup>1</sup> It is a cause of lasting regret that Madison should, in his report on the Virginia Resolutions of 1798, have countenanced the idea that the Constitution is a league between sovereign powers, which having no superior, are each entitled to determine whether the compact has been violated, and what steps are requisite to correct the error. 4 Elliott's Debates (2d ed., Phila., 1876), 540; Hayne's reply to Webster, Jan. 27, 1830, *Ib.* 515. A State may therefore, agreeably to this view, denounce an Act of Congress as unconstitutional, and resist its execution, although it is sustained by the judiciary and all the other States approve or acquiesce. Such a conclusion is obviously irreconcilable with the language which denotes the "people of the United States" as the source of power, which, as appears from the record of the Convention as kept by Madison, and his correspondence, was deliberately employed with the view of placing the General Government on a pinnacle whence it could not be dethroned short of revolutionary force. It was conclusively refuted in the proclamation against nullification, which is the chief merit of Jackson's Administration, and without which we should hardly have continued to exist as a nation. Had not Mr. Clay intervened with a compromise which bridged without closing the gulf, nullification would have been so dealt with then and there, that South Carolina could not have given the signal for civil war in after years.

A reference to history should not awaken sentiments which no one should cherish against his countrymen. When we consider how much of excellence there was in the South; that it gave Washington, Marshall, Madison, Clay, Lowndes, and, we may add, Jackson to the cause of Union; the constancy which it displayed in our times in an unequal struggle; the ability which created the vast machinery of modern warfare literally from nothing,—we cannot but regret that so much valor and energy should have been displayed in a cause, which, even if temporarily successful, would have been attended with injurious consequences, and must ultimately have failed as counter to the current of modern civilization.

Conventions called in the several States, and became binding through their sanction; and finally, that it was by the seventh article provided that "the ratification by the Conventions of nine States shall be sufficient for the establishment of this Constitution," indicating that the instrument was a league or compact made by and for the States, and not a frame of government established by and for the American people. An attentive examination will, I think, disclose, as might have been anticipated, that history and the preamble to the Constitution agree. The mistake is not so much in regarding the States as parties, as in overlooking that they were not the only, or even the chief, actors in the transaction. They occupied the ground on which the new edifice of government was to be erected, and could not be displaced without their consent. Behind the States lay the great body of the American people. The Constitution could not therefore be placed on a secure foundation unless the nation and the States cooperated. Delegates selected by the people, voting in their national capacity without regard to local boundaries, would not have represented the States as distinct political organizations. On the other hand, if the legislatures of the States had alone been consulted, there would have been no proper representation of the people. But as the several parts together make up the whole, so delegates chosen by the people of the several States would also represent the nation.<sup>1</sup>

When the Convention met at Philadelphia, the people of the United States, not less than the people of the States, came through their agents, and being present in both capacities, might determine in which they would act in framing the Constitution. Whether it should be made by the people of the United States and sanctioned by the States, or made by the States and sanctioned by the people, might seem immaterial, because it would in either way be the deed of both. The former method, that the people of the United States should ordain, and the States ratify, was adopted. For if it should be alleged at any future period that the American people had

<sup>1</sup> 3 Elliott's Madison, 551.; see 4 Madison's Writings, 6, 203, 293, 418-420.

no national or organic existence, and that the States were the sole authors of the Constitution, and might undo what they had done, it would still be obvious that if the States mutually agreed that such a people should be regarded as existing, and that the government should be treated as its handiwork, they would, on a well-known and familiar principle which the law has derived from ethics, be precluded for all the purposes of that government, from denying what they had solemnly admitted. I refer to the doctrine of estoppel, that what is held forth as an inducement to others, shall not be retracted after they have acted on the faith of the assurance. The effect was to place the sovereignty of the new government on a basis which was as unalterable as if the Conventions of the various States had publicly proclaimed and crowned a king. There are, as Mr. Madison contended in the remarks already cited, and as Jackson insisted in his proclamation against nullification, grants which must be irrevocable in order to attain their object; and the establishment of a government is one of them. Whether the newly created sovereignty was vested in a commonwealth or in a monarchy, it would on every principle of national and public law have a claim to the allegiance of its subjects which it might enforce by arms.<sup>1</sup>

Established not by one, by two, or by three of the States, but by the people of all the States, speaking in their collective capacity as the people of the United States, the Union could not be dissolved consistently with the well-known maxim that

<sup>1</sup> In the words of Chief-Justice Marshall, "the United States is a government, and consequently a body politic and corporate, capable of attaining the ends for which it was created, by the means which are necessary for their attainment. This great corporation was ordained and established by the American people, and endowed by them with great powers for important purposes. Its powers are unquestionably limited; but while within these limits, it is as perfect a government as any other, having all the properties and faculties belonging to a government, with a perfect right to use them freely in order to accomplish the objects of its institution. *United States v. Maurice*, 2 Brock, 96, 109; *Van Brocklin v. Temple*, 117 U. S. 151, 154.

the power which bound is the only one that can unloose, unless all concurred, and then only because the concurrence of the citizens of all the States in such an act would, on a principle already stated, be in effect a renunciation or abdication by the people of the United States.

The framers of the Constitution cannot, as Mr. Alexander Stephens erroneously suggests in a work entitled, "The War between the States," be justly charged with having through negligence or indifference used the phrase "We the people of the United States" as synonymous with "We the several States." They were grave men, versed in the use of language and aware of the importance of every word in an instrument that was to serve as a landmark for future generations. Few state-papers can be found more remarkable for clearness of thought or sobriety of diction, where the words are better chosen or assigned with more precision to the right place. Indeed, so careful were the delegates that their language should be accurately weighed, and convey their exact meaning, that the Articles as originally drawn or agreed to were referred to a committee on style and arrangement, which among other changes substituted "We the people of the United States," for the "people of the States," and reported the amended draft to the House, where it was compared carefully with the original, deliberately considered, and still further amended in various particulars. It was not until the completion of this process, which lasted during four successive days, that the instrument was ordered to be engrossed, and after being again read, put to the vote which resulted in its passage.

Yet so ingenious are mankind that these precautions, this watchfulness against error, are assigned by the Vice-President of the late Confederacy as a reason for believing that the phrase "We the people of the United States" does not express the deliberate purpose of the Convention, or, in other words, that the delegates were so careless as not to note the alteration which had been made by the committee on style and arrangement, or so wanting in intelligence as not to comprehend its purport. Such an inference is the direct

opposite of that indicated by the premises. In all formally drawn instruments we look for the intention of the parties, not in what was originally proposed, but in what was finally adopted, rejecting all that the instrument does not contain as surplusage or irrelevant. This is not a technical rule, but one of common-sense; the presumption being that whatever was deliberately laid aside formed no part of the ultimate design. But what is decisive of the case in hand, and with regard to some other questions of the same kind, is that the Constitution did not derive its binding efficacy from the signatures of the delegates, but from the vote of the Conventions called for the purpose in the several States; and when they adopted it, its language became theirs, and they could not controvert what it averred. The States consequently ratified the Constitution, not as their act, but as the act of the people of the United States; and by so doing, put it out of their power to recall the grant. The authority of the nation was thus recognized as not only sovereign, but paramount, and became the basis of a government more formally and authoritatively established than any other which history records.

That such was the view taken in Virginia is apparent from the language held in debate and the tenor of the resolution by which the Constitution was finally approved. The attention of the Convention was repeatedly called to the phraseology of the preamble, and they were distinctly told by Patrick Henry and other statesmen of equal weight that a government founded on national consent, so far as its authority extended, would be a consolidated government which could not be set aside or revoked without resorting to the source whence it came.<sup>1</sup> It was not, therefore, without full notice of the nature and magnitude of the issue that the delegates proceeded to the vote which resulted in the ratification of the Constitution, and in so doing "declared on behalf of and in the name of the people of Virginia . . . that the powers granted under the Constitution, being derived from the people of

<sup>1</sup> 3 Elliott's Debates (2d ed., Phila., 1876), 44; ante, p. 70.

the United States, may be resumed by them whenever the same shall be perverted to their injury or oppression ;” thus at once asserting that such a right existed in the nation, and impliedly denying that it could be exercised by the several States.<sup>1</sup>

<sup>1</sup> 3 Elliott’s Debates (2d ed., Phila., 1876), 656; 2 Rives’ Madison, 607, notes.

So Wilson, who led for the cause of the Union in the Pennsylvania Convention, said in effect, in answer to Findlay, the delegate from Westmoreland, who had adverted to the Constitution as a compact, that he “could not discover the least trace of compact in the instrument. There could be no mutuality where there was but a single party, — the people. The preamble was not an unmeaning flourish, but declared in a practical manner the meaning of a system which was not a government founded on compact, but on the power of the people; it was made in their name and by their authority, ‘We the people do ordain,’ etc. From their ratification alone it would derive its Constitutional authenticity; without that it was simply *tabula rasa*.”

## LECTURE VII.

The Nature of the United States Government (*concluded*).— Its Powers enumerated in the Constitution. — Residuary Powers delegated to the State Governments, unless expressly withheld. — The People the Source of all Authority. — The United States Government supreme in the Exercise of its Constitutional Powers. — Its Implied Powers. — Authority to use Proper and Convenient Means a Necessary Incident to the Grant of every Power. — Extent of the Legislative Powers of Congress. — Meaning of the Words “Necessary and Proper.” — Incorporation of Banks. — Taxation. — Registration of Vessels. — Paper Currency. — Bankruptcy. — Punishment of Crimes.

FROM what has been already stated, it follows that if the sovereignty of the United States is limited, the States also are subject to limitations.<sup>1</sup> But there is this material difference, that while the governments of the several States have all the powers that are not withheld in terms, or conferred upon the government of the United States, the United States have no powers that are not enumerated in the grant. This distinction has sometimes been regarded as arising from the nature and origin of the respective grants. The States, it is said, constituted the Union, and retained all the powers which they did not part with. This assumption is not sustained by the language of the Constitution, or by history duly analyzed. The whole is simply this, — certain enumerated powers were conferred by the Constitution on the General Government, and became the common property of the people of the United States. What was not thus given remained in the people of the several States, and was by them vested generally in the State governments, — subject, nevertheless, to numerous restrictions, and reserving certain powers to themselves. To know whether a particular power belongs to a

<sup>1</sup> 5 Elliott's Debates, Madison (Phila., 1876), 212.

State government, we look to the exceptions ; to know whether it belongs to the United States, we look to the enumeration in the grant. If not enumerated, it is not possessed by the United States ; if not excepted, it is possessed by the State. The State governments have everything that is not conferred on the nation, or specifically withheld ; the United States nothing that is not specifically given.

In applying these principles, it is necessary to remember that what is given to the United States is necessarily, or if Congress choose to legislate, taken from the States, or a virtual restraint on them. As between two grants, one particular and proceeding by enumeration, the other general, if there is not room for both, the former will necessarily have the preference. A bequest of all the rest and residue of the testator's property is worth very little if the bulk of the estate is bequeathed specifically by the will. So a grant of all a man's land will not confer a title if there is a deed on record conveying the premises by metes and bounds.

Now, such is the relation between the General Government and the States. Both derive their authority from the people, the one specifically, the other by general words ; but the title of the United States is paramount. This is not a mere priority of time, although the Constitution of the United States is anterior to the State Constitutions as now existing ; it was by the express terms of the grant to take precedence of the States. By Article VI. section 2, the Constitution and the laws of the United States made in pursuance thereof, and the treaties made under the authority of the United States, were declared to be the supreme law of the land ; and the judges in every State were to be bound thereby, anything in the Constitutions and laws of the several States to the contrary notwithstanding.

Plainer words could not be used to express the plain intent that the United States should be supreme, within the limits of the Constitution. In the language of conveyancing, the States take under and subject to the grant to the United States. Everything that is exclusively given to the United States is therefore withheld from the States ; and when the same

power is conferred on both, it must be exercised by the States in subordination to the General Government. The Constitution of the United States is limited only by itself; the State Constitutions have their limitation in the Constitution of the United States. However broad the powers of the States may be, they are notwithstanding circumscribed by the paramount authority of Congress.

From this results an important consequence. When the existence of a power is in question, the presumption is in favor of the States; when the question is whether the power is limited or absolute, the presumption is in favor of the General Government. For while the Government of the United States has no power which the Constitution does not give, it is subject to no restriction which the Constitution does not impose. The powers of the United States are absolute when not restrained by the terms of the gift; the powers of the States are controlled by the gift to the United States.

If we now turn to the Constitution, it will be evident that the powers conferred by that instrument are given absolutely, with some well-defined and limited exceptions. If it confers nothing which it does not express, the whole and every part of that which it expresses is conferred. In the language of Mr. Webster, the Constitution is an enumeration, not a definition or description. Congress shall have power to lay and collect taxes, duties, imposts, and excises; to regulate commerce with foreign nations and among the several States; to coin money, regulate the value thereof and of foreign coin; to declare war; to raise and support armies; and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested in the Government of the United States. The executive power shall be vested in a President of the United States, who shall take care that the laws be faithfully executed. The judicial power shall extend to all cases in law or equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority.

Uncontrolled dominion could not be more clearly given, or

in fitter terms ; and in construing the instrument we must, on every principle of interpretation, follow and be guided by the words. There are certain express restrictions,—“ that no *ex post facto* law or bill of attainder shall be passed ;” that “ the privilege of the writ of *habeas corpus* shall not be suspended ;” that “ no preference shall be given by any regulation of commerce to the ports of one State over those of another ;” nor shall “ any tax or duty be laid on articles of export from any State.” But with these and other exceptions of a like kind, the powers given by the Constitution of the United States have no limits except those set by their own nature and the legislative discretion of Congress.

To illustrate this by an example : when the question is, Can a State rescind a conveyance from A to B, and revest the estate in A, we may examine the Bill of Rights or other prohibitory clauses of the State Constitution. If these forbid the act, we need look no farther. If they do not, on turning to the Constitution of the United States it will appear that the States are forbidden to impair the obligation of contracts, while the decisions of the courts of the United States establish that a grant is a contract within the meaning of this provision. The question must therefore be answered negatively as it regards the State.

Take another instance. Can a State enact a bankrupt law ? The Constitution of the United States does not say that the States shall not make such laws. It does say that such a law may be made by the United States. Wherever the terms in which authority is conferred on the General Government, or the nature of the power, require that it should be exercised exclusively by Congress, the subject is as completely taken from the States as though it were expressly placed beyond their reach. Where a power is bestowed on Congress, and there is nothing contradictory or repugnant in the exercise of the same power by the States, both governments may exercise it in relation to different parts of the subject, and the laws passed by both will be binding and constitutional. If Congress have a power and exercise it in such wise that the exercise of the same power by the States would be incom-

patible, then the State law must give way to the act of Congress,—not because the State law is unconstitutional, but because it is superseded by the paramount authority of the national legislature. It follows that a State bankrupt or insolvent law may be valid notwithstanding the power of Congress to establish uniform laws on the subject of bankruptcy throughout the Union, if Congress have not exercised their authority, and the State law does not impair the obligation of contracts, but that the enactment of a national bankrupt act will repeal the local insolvent laws absolutely, or so far as they conflict with the rule prescribed by the General Government.

Here the authority is express ; but the result will be the same where it is incident or implied.<sup>1</sup> The United States are not expressly authorized to establish corporations, and this power is confessedly possessed by the several States, which are also, *prima facie*, entitled to tax every natural or artificial person within their respective jurisdictions ; and yet if Congress charter a bank or other body corporate to aid in the collection of the revenue, the regulation of the currency, or the execution of any other power conferred by the Constitution, the authority of the States will undergo a corresponding diminution, and they cannot tax the agency which Congress have created. This was established in the leading case of *McCulloch v. The State of Maryland*,<sup>2</sup> to which I shall again refer in the course of this lecture.

These instances establish,—first, that the States cannot adopt any measure which is expressly or impliedly prohibited by the national Constitution ; and next, that although the grant of a power to Congress does not necessarily divest the jurisdiction of the States, it still operates as an implied prohibition of any exercise of their authority that will directly or indirectly conflict with the laws made by Congress. I may here advert to a principle which has been already stated, and which should not be lost sight of in interpreting the Constitution. Although

<sup>1</sup> *Shaw v. McCandless*, 36 Miss. 296; *Richardson v. Montgomery*, 49 Pa. 203.

<sup>2</sup> 4 Wheaton, 316.

the Government of the United States is a limited government, it is not a government of limited powers; the powers which it holds are, on the contrary, to a great extent absolute, and reach as far as may be requisite to effect their objects. It follows from these premises, and is indeed a necessary consequence of any general grant of power, that appropriate means may be used for the attainment of the end which the grantor has in view. In giving a thing, we impliedly give everything without which the thing cannot be used or enjoyed.<sup>1</sup> This is peculiarly true when the subject of the grant is an authority which is to be exercised for the benefit of the grantor, and it may reasonably be inferred that he did not intend the end to be defeated for want of means. It is accordingly an established principle, not less applicable to the Constitution of the United States than as between individuals, that a general power includes the particular powers without which the general power will fail or cannot be executed.

We have now reached the doctrine of implied powers, which has been from the outset of the government the occasion of so much controversy, and has called forth such a brilliant display of ability on either side. It may be approached with more confidence because the path has been already beaten by the greatest minds which our country has produced. And it may here be observed that the distinction between express grants and those which arise by implication is, even in ordinary matters arising between man and man, more obscure than might at first sight appear. In one sense everything is express which appears by a reasonable intendment; in another, that only which is set forth in terms.<sup>2</sup>

The words "yielding and paying" in a lease, may be declared on as an express covenant to pay. One to whom a horse is delivered, with directions to effect a sale, is thereby authorized to give a warranty of soundness; and the better opinion is that if he does, it will be binding on the vendor, although he was expressly forbidden to warrant, unless the restriction was known to the purchaser. A contract to give

<sup>1</sup> First Baptist Church of Erie *v.* Caughey, 85 Pa. 271.

<sup>2</sup> Taylor *v.* Preston, 79 Pa. 436, 443.

a lease at the end of a week, is an undertaking not to dispose of the land during the interval in any way that will prevent the fulfilment of the contract. A direction to an agent to remit money to or on behalf of his principals, is an authority to purchase a bill of exchange or adopt any other customary means of making the remittance. A general authority to collect debts for an absent correspondent is an authority to proceed by suit and retain counsel to conduct the action. In these and the like instances, the power may be designated as implied; but it is not the less a necessary inference from the subject-matter and the words employed.

It is equally well settled that an exception or reservation will not be allowed to defeat the grant, unless it is so worded as not to admit of any other interpretation. The Articles of Confederation declared that the several States should retain every power, jurisdiction, and right not expressly delegated to the United States. And yet these articles not only conferred powers, but imposed duties that could not be fulfilled without the use of means that were not expressly authorized. Congress was, for instance, empowered to coin money and regulate the value thereof. Obviously this could not be done without buying or hiring land, erecting buildings, purchasing machinery, — in a word, taking all the necessary steps for the establishment of a mint; yet none of these things were expressly authorized, and the power to do them could only be derived by implication.

Whatever the rule may have been under the Confederation, it is well settled that the powers given by the Constitution require a large and liberal construction, in view of the object, which was, as has been already stated, “To form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity,” — words which are admirably suited, as Chief-Justice Jay remarked in *Chisholm v. The State of Georgia*,<sup>1</sup> to express a great and beneficent design, and comprising every-

<sup>1</sup> 2 Dallas, 419, 475.

thing that is requisite, with the blessing of Divine Providence, to make the people by whom it was adopted prosperous and happy.

If the evil to be remedied by the passage of a statute, and the good in view, are, agreeably to the teaching of Lord Coke, guides to the intention of the legislature, due effect should be given to the preamble in interpreting the Constitution. From such a portal we may naturally anticipate an edifice of corresponding grandeur. Accordingly, the instrument is throughout in keeping with the purpose announced in the opening clause. It is, as that indicates, a frame of government designed to last through successive generations, and provide for the unforeseen contingencies and perils from which the most favored people are seldom long exempt. The learning and acumen of the jurist should be tempered, in the construction of such an instrument, by the broad and comprehensive view of the statesman; and if intention is the polar star, we may still, in interpreting doubtful words or phrases, remember that the object was the establishment of a government, and lean to that side which will best promote or facilitate such an end.

If the framers of the Constitution had, after this declaration of their purpose, proceeded to a general grant of legislative, executive, and judicial power, no limitation could have been implied that was not expressly imposed, and Congress would have had the legislative omnipotence of Parliament. And it might not have been easy to establish that the enumeration of certain powers excluded others which, although not named, were yet equally necessary and proper with those which were. For although the preamble ordinarily plays a subordinate part in the construction of statutes, and will explain rather than enlarge the enacting clause, still this, like other canons of interpretation, depends for its application on circumstances, and the purpose for which an authority is given must enter into every just estimate of its extent, whether set forth in the preamble or body of the instrument. Every agency carries with it *prima facie* power to employ proper and convenient means for the attainment of the end, and affirmative

words authorizing or pointing out one way or method will not preclude the right to resort to another, unless they are so express and peremptory as to leave no doubt that they were meant to be not only directory but imperative. This is especially true where power is conferred remedially, by statute, on a body which, like a legislature, may be presumed to have been intended to exercise a large and liberal discretion, and provide for remote and unknown contingencies.<sup>1</sup>

The tenth article of the amendments adopted by the First Congress, and ratified by the States, limits and controls, without excluding, this presumption, by declaring that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The wording of this amendment is significant, and merits attention. It does not say that the General Government shall exercise no power which has not been delegated, but that the powers which have not been delegated to it are reserved. It is therefore not a prohibition or restriction, but a reservation or withholding; and in describing what is withheld, it does not speak as the similar clause in the Articles of Confederation had done of powers not delegated expressly, but of powers not delegated, leaving powers which had been delegated, whether expressly or by implication, as they stood before the amendment was adopted.

The effect would therefore seem to have been to exclude the inference that Congress might exercise any appropriate legislative power for the accomplishment of the objects of the Constitution, as set forth in the preamble, and restrict them to the powers which had been expressly given and such other powers as these imply or carry with them by a just and reasonable intendment. Congress is accordingly authorized, by the eighteenth clause of the eighth section of the first article, "to make all laws which shall be necessary and proper for carrying into execution the powers vested by the Constitution in the Government of the United States, or in any officer

<sup>1</sup> *McCulloch v. The State of Maryland*, 4 Wheat. 316, 415; *Commonwealth v. Clark*, 7 W. & S. 127, 133.

or department thereof." It has been said that the authority given by this clause would have been implied, had it not been expressed. It is at all events certain that being expressed, it cannot be questioned. The clause nevertheless is, no doubt, chiefly declaratory, expressing what the context of the Constitution implies, and implying what the tenth article of the amendment of March 4, 1789, soon after expressed.<sup>1</sup>

That the subsidiary power thus given was meant to be comprehensive, is shown by the use of a word which, like "all," includes everything within its circle. A legislative power to make all laws for carrying the various and extensive powers of the government of the United States into execution without any express or implied condition as to their necessity or propriety, would be nearly, if not quite, equivalent to an unlimited power of legislation. It is therefore material to ascertain how far the generality of the grant is restrained by the words "necessary and proper," and whether the determination of what is necessary rests with Congress, or depends on the decisions of the courts. And here there can be no doubt, in view of the cases in which the question has been judicially considered, either generally or under the Constitution of the United States, that when the subject is the discharge of a trust or performance of duty, necessity is to be understood as meaning the compulsion of moral obligation. For as law is, in the sense in which the term is used in morals and jurisprudence, the declaration of that which ought to be, and not as, in the physical sciences, the generalization or statement of that which must be and is, so necessity, which is the offspring of law, has a corresponding signification; and that which should be done in view of all the circumstances will be held legally necessary, whether it is absolutely necessary or not. The authority of the master of a vessel is ordinarily confined to the measures requisite for the successful prosecution of the voyage, and the books sedulously negative his right to go outside of it for any purpose, and especially for that of effecting a sale of the ship, which it is his duty to keep in good condition and surrender to the

<sup>1</sup> 1 Hamilton's Works, 122.

owners when the voyage is over. Convenience, expediency, profit, the fear of loss, will go no part of the way towards authorizing such a sale, which can only be justified by an extreme and urgent necessity transcending ordinary rules and making a law for itself.<sup>1</sup>

And yet it is no less clear from the authorities that to justify the sale of a wrecked or stranded vessel it need not be shown that she could not be got afloat or repaired, or even that she would have perished if allowed to remain where she was until the owners could be heard from, but only that the master was warranted in believing the danger of loss imminent, and that the cost of putting the ship in a condition to pursue her voyage would have exceeded her value; because he will then be under a moral obligation to effect a sale, and the law will esteem it necessary for him to do that which cannot be left undone without a culpable neglect of duty.<sup>2</sup> Another illustration of the legal interpretation of necessity where right or duty is in question, will be found in *Moss v. Smith*,<sup>3</sup> where it was said that in the transaction of business the law esteems that impossible which is impracticable, and that impracticable which involves a loss more than commensurate with the good to be attained. It follows from this rule that where of two methods of executing a power, one will be attended with a disproportionate sacrifice, the other will not be less necessary, because it would have been physically possible to adopt the former. To give a familiar illustration, if it is the duty of an agent to go from Philadelphia to Boston, it may be necessary for him to proceed by rail, although he might reach his destination by sea. And so it may be necessary to take the land of A under a charter authorizing the construction of a railroad, notwithstanding the existence of a shorter line through the land of B. Under these circumstances, the courts will not inquire whether a cheaper or better route could have been surveyed. For

<sup>1</sup> *Patapsco Ins. Co. v. Southgate*, 5 Peters, 604.

<sup>2</sup> *Gordon v. The F. & M. Ins. Co.*, 2 Pick. 249; *Brig Sarah Ann*, 2 Sumner, 206, 13 Peters, 387.

<sup>3</sup> 9 C. B. 94.

although nothing can be done that is not requisite to effect the object, still one of the means to that end is that the railway company or the engineers whom they employ should trace the line; and their decision will consequently be final, unless it is not only erroneous, but a manifest abuse of the power conferred by the grant.<sup>1</sup>

No case can be stronger for the application of these principles than when powers are conferred on a legislature by the will of the people, because they are emphatically trusts for the benefit of the grantors, and must be exercised in the way best calculated to produce the greatest good with the least amount of evil; they cannot be allowed to lie idle without a criminal neglect of duty. The obligation to employ them is imperative, and requires the use of the large and liberal discretion in proportioning means to ends, weighing probabilities, and out of various possible modes selecting the best, which is inseparable from the idea of government, and essential to the performance of its functions.<sup>2</sup> Had the intention been to exclude deliberation, and deprive Congress of the freedom of choice which is incompatible with absolute necessity, "proper" would not have been coupled with "necessary." Their conjoint use shows that the species of necessity which the framers of the Constitution had in view is that which grows out of the duty of using the fittest means when the welfare of the citizen is in question.

This interpretation of the Constitution has accordingly been adopted and acted upon by the legislature from the foundation of the government, and was authoritatively established in the case of *McCulloch v. The State of Maryland*,<sup>3</sup> under circumstances well calculated to raise the question in a form for final adjudication. The Constitution confers no authority on Congress to grant charters of incorporation, nor does it anywhere declare that Congress may empower a corporation to issue paper money or act as a bank of discount and deposit; and it was therefore contended on behalf of the

<sup>1</sup> *Cleveland & Pittsburgh R. R. Co. v. Speer*, 6 P. F. S. 325, 333.

<sup>2</sup> *United States v. Marigold*, 9 Howard, 567, 570.

<sup>3</sup> 4 Wheat. 316.

State of Maryland that as the power to do this had not been given expressly, it could not arise by implication, in the face of the declaration that all powers not delegated were reserved to the States or the people. The act incorporating the Bank of the United States was consequently said to be unconstitutional, and the tax that had been imposed upon it by Maryland valid. But the Supreme Court were clearly of opinion that although Congress have no power to incorporate for the purpose of creating corporations, they are yet as clearly entitled to employ that and every other means which experience may show to be necessary for the execution of their powers and the effectual discharge of the duties imposed upon them by the Constitution; that the phrase "necessary and proper" is synonymous with "needful, requisite, essential, conducive to, appropriate,"<sup>1</sup> and implies rather than negatives the right of the legislative to use the light of experience, to invoke the aid of reason, to accommodate their acts to circumstances, and transcend the line of strict necessity if a better and more effectual method lies beyond; that the collection, transmission, and safe keeping of the revenue of the United States required some place where the money raised by taxation might be deposited, some mode or agency by which it could be transferred from the points where it was received to those where it was to be expended, and that as there was a manifest necessity for supplying this want, the means which Congress had actually adopted must be regarded as actually necessary, because the right and duty of selection lay with them, and if their decision was not regarded as final, every measure might be objected to in its turn as less proper and necessary than some other, and the government arrested in the performance of its functions; that if Congress should make the execution of the powers which have been given, a pretext for the usurpation of others that have been withheld, if they were to pass laws for the accomplishment of objects which the Constitution does not authorize, or use means which it prohibits for the attainment of legitimate ends, it

<sup>1</sup> See 1 Hamilton's Works, 114; Jackson's Bank Veto, July 10, 1832.

would be the painful duty of the Court to declare the attempt unconstitutional and void; but that when the laws which they enact are not forbidden by the Constitution, and are really calculated to effect any of the objects intrusted to the government, the Court will not inquire into the degree of their necessity, and will, on the contrary, hold all measures constitutional which are appropriate to a constitutional object, and not forbidden by the letter or spirit of the Constitution.

I may refer you to the arguments of counsel in this case, and especially to that of Mr. Webster, for a masterly vindication of the principle established by the judgment of Chief-Justice Marshall. Congress are sovereign as regards the objects and within the limits of the Constitution, and may use all proper and suitable means for carrying the powers conferred by that instrument into effect. The means best suited at one time may be inadequate at another; hence the necessity for vesting a large discretion in Congress. Society undergoes a continual change, the arts and sciences advance, men think and act according to a varying standard. A government fettered by an arbitrary rule, while all around is in motion, may cease to be in harmony with the requirements of the times. "Necessary" and "proper" are therefore, as regards legislation, nearly, if not quite, synonymous; that being necessary which is suited to the object and calculated to attain the end in view. If a bank was a fit instrument for the collection of the revenue, it was for Congress, and not for the Courts, to determine whether it should be employed.

The case of *McCulloch v. The State of Maryland* is entirely consonant with the course of judicial decision, and so much in harmony with that of the legislature that if the doctrine which it established were overturned, a large and essential part of the legislation of Congress would fall with it. That the Bank of the United States was twice incorporated by men belonging to different parties, and viewing the Constitution in different aspects; that its constitutionality was never assailed successfully, and was sustained on the only occasion when the question was brought into court; that it finally fell, not in consequence of a denial of the implied power of

Congress to incorporate a bank, which had been asserted for the third time by both branches of the legislature, and was maintained by Jackson, as it had been by Washington and Madison, but because the President thought that some of the details of the bill presented for his signature were objectionable and exceeded the limits of the executive power, — would be enough to prove, if proof were needed, that the principles vindicated by Chief-Justice Marshall are deeply rooted in the Constitution, and cannot be disturbed without destroying its usefulness. They are indeed of such vital importance that their loss would be fatal to the most important functions of government, and those which most nearly concern the citizen. Deprived of all true legislative discretion, and unable to adapt their measures to circumstances, Congress would cease to be the living organ of the present, and become the slave of the Constitution, instead of its minister and servant.

A reference to the statute-book will accordingly show that the right to use unenumerated powers in aid of those specifically enumerated, has been repeatedly exercised, from the first adoption of the Constitution down to the present time. The Government of the United States has no express power to lay an embargo, erect and maintain lighthouses, carry the mails, declare what evidence shall be sufficient for the deduction of title to a vessel, or establish that one who is claimed as a fugitive from labor or justice is such, and must be surrendered in accordance with the demand; nor is it expressly authorized to inflict punishment for a violation of its laws, except in certain enumerated instances, and yet no one would now contend that the silence of the Constitution on these heads proves that they are not within its scope.<sup>1</sup>

In like manner the regulation of contracts belongs, *prima facie*, not to the General Government, but to the several States, and an act of Congress declaring that agreements for the sale of land must be in writing, or authenticated by a seal, is nugatory if made simply with a view to the regulation of the agreement. But it is not less well settled that Congress may,

<sup>1</sup> See *United States v. Marigold*, 9 Howard, 560.

under the power to levy taxes, not only proceed to tax contracts, but adopt any proper means to render the tax effectual. They might, for instance, provide for the collection of an impost on the sales of lands or chattels, by requiring the conveyance to be executed in the presence of a notary, or other duly appointed officer, and that the tax should be paid to him, and his receipt indorsed on the instrument; or they might, as they did during the late civil war, require a stamp to be affixed, and declare the contract inadmissible as evidence unless the rule was observed. Whichever mode was taken would involve the exercise of a power which is not set forth in the Constitution, and would be invalid if used as a means of regulating contracts, and not as ancillary to the power to tax.

It is equally clear that while the Government of the United States has no power to regulate the transmission of property by sale, descent, or gift, and a statute made for such an end would be merely void, whether the subject-matter were a house or a vessel, it is nevertheless endowed with a general authority over foreign and interstate commerce, which includes navigation, as the means by which commerce is prosecuted. Congress may consequently provide for the registration of vessels as instruments of commerce, and that a sale or mortgage of a ship shall be invalid as against *bona fide* purchasers and creditors, unless it is entered at the custom-house or some other office designated by the statute and in the manner which it prescribes.<sup>1</sup>

In *Shaw v. McCandless*, the question arose in Mississippi on a mortgage of a vessel executed in Louisiana, and the court below held that it was invalid under the law of that State, and could not be sustained on the statutes passed by Congress. This decision was reversed by the Supreme Court of Mississippi on the following grounds: "The Supreme Court of Louisiana have held that the statutes of that State do not sanction the execution of mortgages upon vessels unless they are made according to the laws and usages of commerce; and on the authority of these decisions the court

<sup>1</sup> *Richardson v. Montgomery*, 49 Pa. 203; *Shaw v. McCandless*, 36 Miss. 296.

below appears to have held that the mortgage in this case was unauthorized by law, and invalid. These decisions would probably be conclusive if the validity of the mortgage depended entirely on the law of Louisiana. But the rule, as there held, appears to be materially affected by the act of Congress referred to, which provides 'that no bill of sale, mortgage, hypothecation, or conveyance of any vessel or part of any vessel of the United States shall be valid against any person other than the grantor or manager, his heirs and devisees, and persons having actual notice thereof, unless such bills of sale, mortgage, hypothecation, or conveyance be recorded in the office of the collector of customs where such vessel is registered or enrolled, etc.'<sup>1</sup> This is a clear recognition of the power to sell or mortgage vessels, and provides the mode in which it may be effectually done. It was a matter within the power of Congress, under the authority conferred upon it to regulate commerce with foreign nations and among the States, and is incident to the power thus conferred. Before the passage of this act of Congress the subject of the validity of mortgages upon vessels and of their registration was a matter to be regulated by the laws of the States, and the rights arising under such instruments were to be determined by the laws of the States in which the transaction might have taken place; and it was competent for those courts to decide what were the laws and usages of commerce which would justify the execution of such a mortgage. But new rules were established by Congress, and superseded the regulations recognized by the State courts, and which became the laws and usages of commerce in relation to the subject. Hence when the law of Louisiana authorizes mortgages according to laws and usages of commerce, and Congress establishes the rule regulating the subject, that rule becomes the law of commerce in relation to the subject; and if it authorizes the execution and registration of mortgages upon vessels, all mortgages made and recorded according to the requirements of the act, must be valid."

<sup>1</sup> U. S. Stat. at Large, 440.

Commerce among the States is logically as much within the scope of the above argument as that with foreign nations; and it consequently seems broad enough to include railways running from State to State, and the locomotives and other rolling-stock needful for the transportation of freight and passengers. For as these are all instruments of commerce, they may equally with vessels be controlled and regulated by Congress. Had the narrow and exclusive spirit which at one time led Pennsylvania to view the construction of a railroad from Baltimore to Cincinnati with jealous eyes, and refuse the right of passage through her borders, continued to operate, it might have been requisite for the national legislature to grant the charter which the State withheld; and there would have been an ample justification for the exercise of a power which has ordinarily been suffered to lie dormant. So the United States may, under the rule laid down in *McCulloch v. Maryland*, direct or authorize the construction of a high-road or railway whenever such a measure is requisite for the transportation of the troops and warlike stores necessary for national defence, or to maintain the supremacy of the General Government; and the incorporation of the Northern Pacific and Union Pacific Railroad companies might be maintained on this ground if there were no other.<sup>1</sup>

The argument applies *a fortiori* where a power is given expressly; and it may then obviously not only be put to its

<sup>1</sup> Another application of the doctrine of implied powers that would appear extreme may be found in the right to enact a protective tariff for the encouragement of American manufactures, which, though nowhere expressed in the Constitution, may, agreeably to the practice of our government, be deduced from the power of taxation and the power to regulate commerce. Such was the view of Madison (3 Madison's Writings, 571, 654, 659; 4 Id. 6, 7, 144, 241-249), and, as he contended, it was shared by Jefferson. This latitude of interpretation may appear singular on the part of strict-constructionists, who denied the power of Congress to make appropriations for internal improvements, or to charter a bank as an instrument for the collection of the revenue and a means for its safe keeping and disbursement. 1 Madison's Writings, 528; 4 Id. 140; 3 Id. 542; 4 Id. 140; Madison's veto of the Bonus Bill; Elliott's Debates; 3 Madison's Writings, 351.

peculiar use, but employed as a means of executing any other power enumerated in the Constitution. It has, nevertheless, been contended that the delegation of a limited power is not merely a grant, but a prohibition, and that the same power cannot be used in aid of the other clauses of the Constitution in a different or enlarged form, although it is a necessary and proper means of carrying them into effect, and they will prove abortive if it be not employed. This proposition has been coupled with another, which is alleged to rest on the authority of Chief-Justice Marshall, and would singularly restrict the authority of Congress.<sup>1</sup>

“There is,” said Sharswood, P. J., in *Borie v. Trott*, “another limitation upon the discretion of Congress in the choice of necessary and proper means. It is clearly stated in *McCulloch v. The State of Maryland*, and indeed the principle of it may be considered to have ruled the case. ‘The power of creating a corporation, though appertaining to sovereignty, is not, like the powers of making war or levying taxes or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them.’ I understand the Supreme Court in this language to lay down the simple and reasonable — I might perhaps say the self-evident — proposition, that no one enumerated power can be incidental to another enumerated power.

“Three cases are stated as examples of substantive powers, but only as examples. We have no right to say that any one of the express powers is more substantive and independent than another. Their very expression authoritatively stamps their character. If, therefore, a power is delegated, but in terms which import a limitation or qualification, it cannot be exercised as incidental to some other power, disregarding the limitation or qualification annexed to the express grant.

“Indeed, such limitation or qualification may be considered as a prohibition against the exercise of that power in any other way, and therefore within the limit which the Supreme

<sup>1</sup> *Borie v. Trott*, 5 Philadelphia, 397.

Court places upon the discretion of Congress in the enunciation of the general principle ; namely, that Congress cannot employ a measure, however necessary and proper it may be for carrying into effect some express power, if that measure has been prohibited."

It was said to follow that inasmuch as Congress cannot emit bills of credit or render them a legal tender by virtue of the power to "coin money" and "regulate the value thereof," which contemplates a metallic standard, they cannot establish a paper currency under any other clause of the Constitution, even if, as happened in 1837, the circumstances are such that specie disappears as fast as it is coined or issued, and the government cannot be carried on or commerce regulated without creating money in some other form.

The main current of decision, nevertheless, runs counter to this inference, and clearly shows that all that can justly be inferred from a qualified or restricted grant of a substantive or any other power, is that the limits thus set may not be transgressed under or by virtue of the power so conferred, and not that it will operate as a restraint on other powers, which, though differing in kind, may at some time or place cover the same ground. This is the more obvious, because the powers of government overlap, and much that is ordinarily incidental to one may under different circumstances be appropriate to some other, and needful for carrying it into effect. Thus an embargo may be either, as it was under Jefferson, a regulation of commerce, designed to shield the ships of a neutral state from the depredations of the belligerents, or a means taken by a belligerent to distress the enemy, or promote the success of some military or naval operation. So, conceding that Congress cannot issue paper money where the object is solely to create or regulate the currency, it does not follow that they may not have recourse to such a measure under the power to regulate commerce, or to raise armies and take such other steps as are requisite for defence against a foreign or domestic foe.

We may also believe, notwithstanding the opinion attributed to Chief-Justice Marshall, which was incidental rather

than essential to the decision of the case in hand, that the right to deduce a power by implication depends primarily on whether it is necessary and appropriate, and that if it is, the circumstance that it is great or substantive will not be a conclusive argument against its use. If, for instance, Congress had not been expressly authorized to "coin money and regulate the value thereof," they might presumably have passed such a bill as indispensable to the regulation of commerce; and so of the power to establish uniform laws on the subject of bankruptcies throughout the United States. A power may, no doubt, be so entirely *sui generis*, so far distinct and several, that it cannot be subsidiary, or a necessary and proper means for the attainment of any object save its own, and it may well be that there is no clause from which the power to regulate commerce could be implied, were it not given in terms; but this can hardly be said of the power to establish a currency, of the power to borrow money, or even of the power of taxation. Such seems to have been the view taken by Madison, when, in his serene old age, he recurred to the lines on which he had framed the ship of State with a single eye to the great end in view, and while yet unbiassed by party strife.<sup>1</sup>

<sup>1</sup> Madison to Joseph C. Cabell, Sept. 18, 1828; 4 Elliott's Debates (2d ed., Phila., 1876), App. 600.

"The Constitution vests in Congress expressly 'the power to lay and collect taxes, duties, imposts, and excises,' and 'the power to regulate trade.' That the former power, if not particularly expressed, would have been included in the latter as one of the objects of a general power to regulate trade, is not necessarily impugned by its being so expressed. Examples of this sort cannot sometimes be easily avoided, and are to be seen elsewhere in the Constitution. Thus the power 'to define and punish offences against the law of nations,' includes the power, afterwards particularly expressed, 'to make rules concerning captures, etc., from offending neutrals.' So also a power 'to coin money' would doubtless include that of 'regulating its value,' had not the latter power been expressly inserted. The term 'taxes,' if standing alone, would certainly have included duties, imposts, and excises." 3 Madison's Writings, 637. Two recent cases carry this view to an extreme, by holding that taxation may be used as a means for the regulation of the currency and of commerce, without regard to the uni-

If the argument that an express gift of power is also a limitation is correct, it must apply to the clause which authorizes the punishment of crime. No power can well rank higher or be more substantive than that which subjects the life and fortune of the citizen to the government and authorizes it to fine, to imprison, and if need be to execute. Such, accordingly, was the ground taken in the following extract from the Resolutions which were drafted by Jefferson and adopted by the Kentucky Legislature in 1788.

“The Constitution of the United States having delegated to Congress a power to punish treason, counterfeiting the securities and current coin of the United States, piracies and felonies on the high seas, and offences against the laws of nations, and no other crimes whatsoever, and it being true as a general principle, and one of the amendments to the Constitution having also declared, that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people, also, therefore, the same act of Congress passed on the 14th day of July, 1798, as also the act passed by them on the 27th of June, 1798, entitled an act to punish frauds committed on the Bank of the United States, and all other acts which assume to create, define, or punish crimes other than those enumerated in the Constitution, are altogether void.”

This conclusion results logically from the premises, and may be regarded as a *reductio ad absurdum*. Had it been sustained by public opinion and in the courts, the General Government would have been impotent, and could hardly have continued to exist. It is a sufficient answer that Congress are expressly authorized to legislate for carrying the various powers granted by the Constitution into effect, which necessarily implies that they may add the sanctions without which law exists but in name.

Principles declared abstractly, and rules which there are no means of enforcing, do not deserve the name of law; and formity which is indispensable in the exercise of the express power to tax. *Veazie Bank v. Fenno*, 8 Wall. 535, 549; *Head-money Cases*, 112 U. S. 580, 596.

hence an authority to legislate is also an authority to punish every one by whom the laws so made are violated. To say that the Government of the United States may provide for carrying the mails, and make all laws that are necessary and proper for that end, but cannot punish a carrier who purloins the letters intrusted to his care, is an absurdity which refutes itself. "The several powers of Congress," said Marshall, C.-J., in *McCulloch v. The State of Maryland*,<sup>1</sup> "may exist in a very imperfect state, to be sure, but they may exist and be carried into execution, although no punishment should be inflicted in cases where the right to punish is not expressly given. Take, for example, the power to establish post-offices and post-roads. This power is executed by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post-road from one post-office to another. And from this implied power has again been inferred the right to punish those who steal letters from the post-office or rob the mail. It may be said with some plausibility that the right to carry the mail and punish those who rob it is not indispensably necessary to the establishment of a post-office and post-road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its

<sup>1</sup> 4 Wheaton, 417; and in *Ex parte Yarbrough*, 110 U. S. 658, Mr. Justice Miller, delivering the opinion of the court, said of the argument "that when a question of the power of Congress arises, the advocate of the power must be able to place his finger on words which expressly grant it;" and that if "there is no *express* power to provide for preventing violence exercised on the voter, as a means of controlling his vote, no such law can be enacted. It destroys at one blow, in construing the Constitution of the United States, the doctrine universally applied to all instruments of writing, — that what is implied is as much a part of the instrument as what is expressed. This principle, in its application to the Constitution of the United States more than to almost any other writing, is a necessity by reason of the inherent inability to put into words all derivative powers, — a difficulty which the instrument itself recognizes, by conferring on Congress the authority to pass all laws necessary and proper to carry into execution the powers expressly granted, and all other powers vested in the government, or any branch of it, by the Constitution (Article 1, sect. 8, clause 18)."

existence. So of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offences is certainly conducive to the due administration of justice ; but courts may exist, and may decide the causes brought before them, though such crimes escape punishment.”<sup>1</sup>

It is established, in conformity to these principles, that the power of the United States to inflict punishment is co-extensive with the field of legislation, and may be exercised whenever the laws of the United States are violated, notwithstanding the narrow and seemingly restrictive wording of the clause by which alone it is conferred in terms.<sup>2</sup>

“ The importation of counterfeit foreign coin or uttering the same knowingly ” may accordingly be made a criminal offence, although the express grant is limited to counterfeiting the current coin of the United States ; because as Congress are authorized to regulate commerce and the value of foreign coin, they may adopt any appropriate means to prevent the introduction of spurious currency which would hinder trade and render it insecure.<sup>3</sup>

I may add that the doctrine of “ implied powers ” contains nothing exceptional or peculiar, or that is not applied in the interpretation of other instruments ; and depends on reasons that are inherent in the nature of things ; namely, the difficulty of anticipating the means that will be requisite to carry out a general intent, and the impracticability of setting them forth if foreseen.<sup>4</sup> Such an enumeration would be not only tedious and superfluous, but dangerous, as affording room for the

<sup>1</sup> Marshall, C.-J., in 4 Wheaton, 417.

<sup>2</sup> *Ex parte Yarbrough*, 110 U. S. 658.

<sup>3</sup> *United States v. Marigold*, 9 Howard, 560. Mr. Jefferson, like many other candidates, saw with different eyes after he had attained the Presidential chair ; and the embargo and the annexation of Louisiana are, like the re-charter of the Bank of the United States, the Funding system, the Fugitive-Slave law, and the general course of the Democratic party while in power, a practical refutation of the theories which he advanced while seeking to displace the Federalists and assume the reins of government.

<sup>4</sup> *Ex parte Yarbrough*, 110 U. S. 659.

argument that omission is equivalent to exclusion. A general power consists of the particular powers that are essential to its execution, into which it may be analytically resolved, and that are consequently denoted when it is named.

However diverse these may be, they may still be regarded as a whole in view of the purpose to which they are applied, and their fitness for the attainment of the end. Thus an authority to construct a railroad involves a power to select a route, which may deviate widely from a straight line between the termini, a power to take land without the consent of the owners, and even a power to lay rails, sidings, and switches in the streets of an intervening town and appropriate or demolish the houses if requisite for the completion of the road.<sup>1</sup> And the silence of the charter as to these or other means of a like kind will not preclude their use. If this is true of a grant from the State to individuals, it should for a stronger reason apply to the popular grant which endowed the United States with the vast and complex powers needed for the common defence and to promote the general welfare.

<sup>1</sup> *Brocket v. The Ohio & Pennsylvania R. R. Co.*, 2 Harris, 244; *Cleveland R. R. Co. v. Speer*, 6 P. F. Smith, 326, 335; *Ridge Turnpike Co. v. Stoevers*, 2 W. & S. 548; *Clarke v. B. & P. Bridge Co.*, 5 Wright, 157.

## LECTURE VIII.

The Duty of the Judiciary to declare an Unconstitutional Statute invalid. — Effect on the Popular Mind. — The People of the United States Constitutionalists. — The Sovereignty of the American People limited. — Political Questions beyond the Scope of Judicial Power. — Whether a State Government is Legitimate and Republican must be determined by the Congress and President. — The Legislative and Executive Departments of the State and National Governments cannot be restrained by an Injunction. — Protective Tariff. — The Courts cannot redress an Abuse of the Power of Taxation. — English Courts may declare an Act done by the King or the House of Commons, invalid. — The American Courts have a like Power as to Acts done by the Government as a whole. — The King can do no Wrong, but his Ministers may be held responsible as Trespassers for obeying his Commands. — Application of this Principle to the Officers and Agents of the State and National Governments. — No such Redress can be obtained in France. — French *Droit Administratif*. — Tendency to adopt it here.

It is the exalted function of the Supreme Court of the United States to compose the differences arising out of the complex relations of the States and the General Government, and define how far the powers of each extend and what is the measure of their authority over the people. Although this feature of our government was in great measure new, it has more than any other fulfilled the expectations of the statesmen who devised the entire plan. Viewed with a jealous eye by the party which soon became predominant and maintained its ascendancy for more than fifty years, thwarted and superciliously regarded by Jackson, and brought into conflict with the State tribunals whose decisions were overruled, it yet acquired a hold on the confidence and affection of the people which remains unshaken, and drew forth the encomiums of De Toëqueville in his admirable treatise on Democracy in the United States.<sup>1</sup>

<sup>1</sup> La Démocratie en Amérique, vol. i. ch. vi. pp. 167, 171, 172 (Paris, 1836).

Here, as elsewhere, we should not forget that the success of our institutions was largely due, in the earlier stages of our national existence, to the men by whom the various departments of the government were administered. Chief-Justice Marshall brought to the discharge of his high office moderation, sagacity, firmness, a large experience of men and things, a clear view of what is practicable as well as of what is theoretically desirable and just, — in short, the qualities of the statesman not less than those of the judge, — and had, moreover, the judicial eloquence which gives abstract principles form and brings them home to the common mind. Thrown into the crucible of his capacious mind, the numerous and intricate problems growing out of the new order of things were cleared from the fumes and dross of party politics, and resolved in judgments lucid as Mansfield's, but having a wider range, and rising to the height of political considerations which may be discussed in Parliament, but are seldom open to an English court. Like all that is truly great, their greatness became more apparent as time silenced the passions and prejudices of the hour, and disclosed their true proportions; and they are landmarks for the public men of the present and future generations. The civil war set its seal on their truth as parts of our political system by manifesting the resolve of the American people to carry them into effect at whatever cost of blood and treasure; and they will not again be controverted while the Republic endures.

Erecting the judiciary into a department of the government which is the sole judge of the extent of its powers, while authorized to declare the acts of the other departments invalid, has been criticised as without a precedent in public law, and harmful in imposing an undue restraint on legislation; but it will appear on examination to be a necessary result of the application of established principles to a written Constitution like that of the United States.<sup>1</sup>

When two different and inconsistent statutes bear on the same subject-matter, the courts must necessarily decide which shall prevail; and although the preference is ordinarily given

<sup>1</sup> Dicey, *Law of the Constitution*, 145 (London, 1885).

to the last, as the conclusion finally reached by the legislature, the rule does not apply when the first in date proceeds from a superior power, and the second from one of lower grade. To cite an analogy which comes near home, had an issue been joined between a colonial statute and an anterior act of Parliament in force on this side of the Atlantic, the decision must obviously have been in favor of the latter. Now, the relation of the Constitution is that of such a statute, as being the standing exponent of the national will, which in creating the government set bounds to its powers that cannot legally be overpassed. It is as much a part of every statute as a letter-of-attorney is of the deed executed under the authority which it confers, and cannot be overlooked by the judges consistently with the plain intent of the instrument and the doctrines of the common law.<sup>1</sup>

That no such power can be exercised in England, arises not from a difference of principle, but from the structure of a government which is in this regard unlike our own. The function of the judiciary is everywhere to interpret or apply, and not to make the law; and if the customary or common law is plastic, and may be moulded to the needs of an advancing civilization, the courts cannot question or set aside an act of Parliament as contrary to the principles of a Constitution which has in a great measure been formed by Parliament, and may be altered if it thinks proper.<sup>2</sup>

It has been said that a sovereign cannot by any act or declaration part irrevocably with his powers or render them less effectual as a means of government. If this were true generally, it would not hold good in this country, where power is distributed among the United States, the several States, and the people. Government under our system is not absolute, but a delegation or agency created for certain purposes, and must keep within the limits of the grant. As Mr. Webster observed in arguing the case of *Luther v.*

<sup>1</sup> Dacey, *Law of the Constitution*, 146; 5 Elliott's *Madison*, 355, 356, (Phila., 1876); 4 *Id.* 19, 100, 208, 214.

<sup>2</sup> De Tocqueville, *Democracy in America*, 126 (Cambridge, 1862).

Borden :<sup>1</sup> "The people may not only limit their government, they may and often do limit themselves; they secure themselves against sudden changes by mere majorities. The fifth article of the Constitution of the United States is a clear proof of this." Mr. Whipple remarked in the same case that under this article, as population was then distributed, "sixteen millions of people in the larger States might be in favor of amending the Constitution, but their will might be thwarted by four millions in the smaller States. What then becomes of the alleged American doctrine of popular sovereignty acting by majorities?"

Whatever may be the inconvenience of placing the legislature under the tutelage of the judiciary, as regards the extent and nature of their powers, it has the merit of inculcating a respect for law in a sense in which it was never taught before. Law has generally been regarded as a rule laid down for the guidance of the subject; and that, from the nature of the case, cannot be binding on the departments of the government which are the source of law and may alter or dispense with it at pleasure. The persistent and successful efforts of the English people to check the power of the Crown ended in establishing the supremacy of Parliament, — which, though till recently conservative, is rapidly becoming a merely popular assembly, and may deal with the ownership of land in England as it has done in Ireland, impair the obligation of contracts, or carry the theory of the socialist into practice in defiance of political economy.

Such absolute power cannot safely be lodged in a single hand; but it is easier to limit the authority of a king than to set bounds to the sovereignty of the people or of a government acting in their name. The founders of the State and federal governments met the difficulty by reducing the principles of Magna Charta and the Petition of Right to rules which were embodied in the Constitution and became a restraint alike on the legislature and on the executive, and unalterable even by a majority of the people, unless three fourths of the States concur. The effect was to subordinate

<sup>1</sup> 7 Howard, 131.

the popular will, as declared or perverted by the legislature, to the settled national purpose that life, liberty, and property shall be as secure from deprivation by Congress, the State legislatures, or the people of the several States acting through conventions, as they are in England against the king. Statutes enacted by the States or passed by Congress may accordingly be subjected to a judicial scrutiny at the suit of an individual, and set aside if found to be at variance with the higher and organic law. The conviction that power is subordinate to right, is thus brought home to the popular heart with an assurance that could be given in no other way, and a lesson taught which is of the utmost value in the political education of the American people. To it and to the long training of our forefathers in the jury-box we may ascribe the judicial temper that renders it possible for the people of the United States to be sovereign, and yet not despotic.<sup>1</sup>

<sup>1</sup> "The main reason why the United States have carried out the federal system with unequalled success is that the people of the Union are more thoroughly imbued with Constitutional ideas than any other existing nation. Constitutional questions arising out of either the Constitutions of the several States or the articles of the Federal Constitution are of daily occurrence, and constantly occupy the courts. Hence the citizens become a people of constitutionalists; and matters which excite the strongest possible feeling, — as, for instance, the right of Chinese to settle in the country, — are determined by the Judicial Bench, and the decision of the Bench is acquiesced in by the people. This acquiescence or submission is due to the Americans inheriting the legal notions of the common law; that is, of the most legal system of law, if the expression may be allowed, in the world." Dicey, *Law of the Constitution*, 166. If this remark be just, what madness it is to believe that the immigration of millions of Chinese who have had no such training, and whose traditions moreover are of an opposite kind, is compatible with the harmonious and successful working of the most complicated federal system that the world has known! The weight of these considerations is increased if, as was asserted by the House Committee for Foreign Affairs in 1884, "the notorious capabilities of the lower classes of Chinese for perjury has flooded the Federal courts with cases which, being quasi-criminal, are entitled to precedence over more important business; and we agree with Mr. Justice Field that the 'Chinese cannot assimilate with our people, but must continue a distinct race amongst us, with institutions, customs, and laws entirely variant from our own.'" *Chew Heong v. The United States*, 112 U. S.

Admirable as is the adjustment which renders the Supreme Court the interpreter of the Constitution, it does not from the nature of things cover the entire ground; and there are cases where Congress are the sole judges of the nature and extent of their powers, and an appeal cannot be had to the judiciary. Such an instance may arise under the fourth section of Article IV., that "the United States shall guarantee to every State in the Union a republican form of government . . . and, on the application of the legislature or of the executive, . . . from domestic violence;" and should the power be abused, the remedy is at the polls, or if the evil is intolerable, through the exercise of the inalienable right of revolution.

If, for example, there are two rival governments in a State, and either of them calls upon the President for aid under the above article, it is his duty to determine which is legitimate and should be upheld; and his decision will, even if made ignorantly or as the result of party bias, be conclusive not only as regards the parties, but on the judiciary. A duly constituted State government might thus be overthrown, and another substituted having no just claim to that character, and proceeding under different laws. A like result might follow if Congress saw fit to determine for no sufficient cause that a State government was not republican within the somewhat elastic meaning of that term.

That such questions are purely political, and do not belong in the province of the judiciary, sufficiently appears from the case of *Luther v. Borden*,<sup>1</sup> which arose under the following circumstances, and throws an instructive light on some doubtful points of public law. At the period of the American Revolution, Rhode Island did not, like the other States, frame a constitution, but continued under the form of government

536, 568, 577. It is not, therefore, surprising, as he observed in the same case, "that thoughtful persons who were exempt from race prejudice, saw in the facilities for transportation between the two countries the certainty that at no distant period, from the unnumbered millions on the opposite shores of the Pacific, vast hordes would pour in on us, overrunning our coast and controlling its institutions."

<sup>1</sup> 7 Howard, 1.

established by the charter of Charles II., making such alterations as were necessary to adapt it to the condition of an independent State, but providing no mode by which the government might be changed or amended. The charter confined the right of suffrage to freeholders, which caused much discontent, and meetings were held and associations formed, resulting in the election of a Convention to devise a Constitution to be submitted to the people. This Convention framed a Constitution, directed a vote to be taken upon it, and declared that it had been ratified by a majority of the people of the State. Elections were then held under it for governor, members of the legislature, and other officers, who assembled in May, 1842, and proceeded to organize the new government. These proceedings were not recognized by the charter government, which, on the contrary, passed stringent laws for the maintenance of its authority, and finally passed an act declaring martial law. In the mean time a new Constitution, which had been framed by a Convention elected at the instance of the charter government, went into operation, and has continued ever since. The question which of the two opposing governments was the legitimate one was brought to an issue by the organization of an armed force to supersede the charter government and set the other in its place. The plaintiff, who had taken up arms for this purpose, was arrested under the order of the commander appointed by the charter government and by virtue of the act establishing martial law. He brought an action for damages, and the case was tried in the Circuit Court of the United States, and a judgment rendered for the defendant, which was taken, under a writ of error, to the Supreme Court of the United States and affirmed.

The authority of the charter government was not, in the opinion of that tribunal, open for discussion as a judicial question, because the President had recognized it as legitimate by calling out the militia for its support, and an arrest might properly be made under martial law if the circumstances required it and no more force was used than was necessary. "The Constitution of the United States," said Chief-Justice

Taney, "as far as it has provided for an emergency of this kind and authorized the General Government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department. The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion, and, on the application of the legislature or of the executive (when the legislature cannot be convened), against domestic violence. Under this article of the Constitution it rests with Congress to decide what government is the established one in a State; for as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority, and its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts. So, too, as relates to the clause in the above-mentioned article of the Constitution providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfil this guaranty. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the Federal Government to interfere. But Congress thought otherwise, and no doubt wisely; and by the act of February 28, 1795, provided that 'in case of an insurrection in any

State against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State, or of the executive (when the legislature cannot be convened) to call forth such number of the militia of any other State or States as may be applied for as he may judge sufficient to suppress such insurrection.' By this act, the power of deciding whether the exigency had arisen upon which the Government of the United States is bound to interfere, is given to the President. He is to act upon the application of the legislature or of the executive, and consequently he must determine what body of men constitute the legislature, and who is the governor, before he can act. The fact that both parties claim the right to the government cannot alter the case, for both cannot be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And the President must of necessity decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress.

"After the President has acted, and called out the militia, is a circuit court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States, or the government which the President was endeavoring to maintain. If the judicial power extends so far, it is the guaranty of anarchy, and not of order.

"Yet if this right does not reside in the courts when the conflict is raging, if the judicial power is at that time bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is

restored, punish as offences and crimes, the acts which it before recognized and was bound to recognize as lawful.

“It is true that in this case the militia were not called out by the President. But upon the application of the governor, under the charter government, the President recognized him as the executive power of the State, and took measures to call out the militia to support his authority if it should be found necessary for the General Government to interfere; and it is admitted in the argument that it was the knowledge of this decision that put an end to the armed opposition to the charter government and prevented any further efforts to establish the proposed constitution by force. The interference of the President, by announcing his determination, was therefore as effectual as if the militia had been assembled under his orders. And it should be equally authoritative; for certainly no court of the United States, with a knowledge of this decision, would have been justified in recognizing the opposing party as the lawful government, or in treating as wrongdoers or insurgents the officers of the government which the President had recognized and was prepared to support by armed force. In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice; and this principle has been applied by the act of Congress to the sovereign States of the Union.”

Another reason assigned for giving judgment for the defendant was that the point had been decided by the courts of Rhode Island in favor of the charter government. The question related altogether to the Constitution and laws of that State, and it was settled that as to such questions the federal tribunals were bound to take the State decisions as their guide. It followed that the arrest must be regarded as lawful if, as appeared, the circumstances authorized the declaration of martial law.

It may be observed on this head that if the question was not judicial, it could no more come under the cognizance of a State than of a Federal tribunal. Moreover, if the decisions of the State judiciary are authoritative where such

points are involved, what will be the result if the President takes a different view, and recognizes the government which the State court has disowned? What the Chief-Justice may be supposed to have intended is, that the government which is in actual possession of the field, and whose laws are recognized and enforced by the State tribunals, should be regarded as the legitimate government, unless the contrary is unmistakably clear.

The question whether a political act can be restrained by the judiciary, arose at a much earlier period in the case of *The Cherokee Nation v. The State of Georgia*,<sup>1</sup> with a like result. The bill prayed for an injunction to restrain Georgia, her governor, attorney-general, judges, sheriffs, constables, and all other officers, from executing the laws of that State within the territory of the Cherokee Nation as defined by the treaties then subsisting between the United States and the Cherokees, and that two laws passed by Georgia in the years 1828 and 1829 should be declared unconstitutional and invalid, and that a like decree should be made with regard to the pretended right of Georgia to the possession, government, or control of the lands, mines, or other property of the Cherokees. The bill was dismissed for want of jurisdiction, because the Cherokee Nation was neither a foreign State nor a State of the Union within the meaning of the grant of judicial power to the United States. But Chief-Justice Marshall also said that the court "was asked to do more than decide on the Indian title, it was required to control the legislature of Georgia and to restrain the exercise of its political power. The propriety of such an interposition might well be doubted; it savored too much of the exercise of political power to be within the province of the judicial department."

Here, therefore, was a case in which the court was inadequate to the performance of its function as an arbiter between the States and the nation. The legislation of Georgia confessedly conflicted with the treaties by which the Indians had

<sup>1</sup> 5 Peters, 1.

successively parted with portions of their lands, each of which contained a solemn guaranty of the residue, until they retained no more of their formerly extensive territory than was necessary for their comfortable existence. The bill was filed to preserve this remnant, and there could be no more doubt of the right of the complainants, than as to the gross unconstitutionality and injustice of the legislation by which it was assailed; yet in the opinion of the court the wrong was political, and if Congress and the executive did not intervene, could not be redressed by the judiciary.

In this instance the provision that the Constitution and treaties made under the authority of the United States shall be the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding, proved an ineffectual safeguard against the tyranny of a State; but in a recent case a State was turned out of court on the ground that the judiciary cannot restrain or take cognizance of the political acts of the Union. Secession provoked a civil war, ending in the defeat of the insurgents; and it was plausibly and, as it would seem, logically contended that they might be answerable as individuals, but that nothing had occurred to impair the rights or status of the States as defined by the Constitution. The war was a defensive struggle; and when it terminated in the suppression of the rebellion, the government remained on its original basis. This ground might seem to be well taken under the doctrine laid down in *Texas v. White*,<sup>1</sup> and confirmed by the subsequent course of decision, that a State, like an English king, can do no wrong, and that acts done under color of an authority from her — as, for instance, an ordinance of secession, which conflicts with the Constitution of the United States — are trespasses for which the doers may be held civilly and criminally responsible, but do not affect the relations of the State to the Union.<sup>2</sup> The answer was, that however true this might be abstractly, still, when force was requisite to subdue a rebellion, it might be

<sup>1</sup> 7 Wall. 700. See *Poindexter v. Greenhow*, 114 U. S. 271, 290.

<sup>2</sup> *Thorington v. Smith*, 7 Wallace, 1; *Williams v. Beuffy*, 96 U. S. 176; *Poindexter v. Greenhow*, 114 U. S. 270, 290.

applied so long as it was necessary to keep the insurgents down and prevent another outbreak. While such a danger existed, military government might be substituted for civil throughout the insurrectionary district, and upheld by arms.

Congress were of this opinion; and in March, 1867, passed an act which, after reciting that no legal State governments or adequate protection for life or property existed in the States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas, and that it was necessary that peace and good order should be enforced in them until loyal and republican State governments could be legally established, divided the States above named into five military districts, and rendered it incumbent on the President to assign to each one an officer of the army, and to detail a sufficient military force to enable him to perform his duties and enforce his authority within his district. The duty of this officer, as prescribed by the statute, was to protect all persons in their rights, to suppress insurrection, disorder, violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals, either through the local civil tribunals or through military commissions, which the act authorized. It was provided, further, that on the formation of new constitutions, and compliance with certain conditions which the act prescribed, the States respectively should be declared entitled to representation in Congress, and the preceding part of the act become inoperative; and that until they were so admitted, any civil governments which might exist in them should be deemed provisional only, subject to the paramount authority of the United States, and liable to be abolished, modified, controlled, or superseded.<sup>1</sup>

Leave having been asked to file a bill praying that the President be enjoined from executing this act, the Attorney-General objected to it as containing matters that were not fit to be received, and a hearing took place on the preliminary question. It was urged on behalf of the complainants that

<sup>1</sup> The State of Mississippi v. Johnson, 4 Wallace, 475.

in a time of profound peace, as indicated by the language of Congress in designating the States in question as "lately in rebellion," they were to be cut up into military districts, deprived of the rights of trial by jury and self-government, and placed under the rigor of martial law. If such was the character of the act, and it contravened the Constitution, the court would, in pursuance of its duty as understood by Hamilton, Jay, and Madison, and expounded by Marshall, declare it null and void. Chief-Justice Chase said, in declining to permit the filing of the bill, that an application for an injunction to prevent the execution of an act of Congress was unprecedented, although occasions had not been wanting when it might have been made. Neither Congress nor the executive could be restrained by the judicial department of the government, although the acts of both might be subject to its cognizance when performed. The case might be regarded in another aspect. "Suppose the bill filed, and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court, and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court? These questions answer themselves."<sup>1</sup>

The last observation seems open to criticism. It certainly must be an answer to an impeachment for not executing a statute, that it has been pronounced unconstitutional by the tribunal which is authorized to decide what acts are within

<sup>1</sup> *The State of Mississippi v. Johnson*, 4 Wallace, 475.

the lines of the organic and higher law ; and one department of the government should not refrain from performing its appropriate function on the assumption that another department will be found wanting, or disregard a judgment that should be deemed conclusive. *Non possumus* may be a dignified reply when a court is asked to forego its powers, but cannot be said with equal dignity as a reason for refusing to exercise them, or to give the party who is in the right the benefit of a decision to that effect.

The issue was not brought in this instance, or in that of the bill filed by the Cherokees, to the point contemplated by the Constitution. The question did not arise between individuals, but was presented abstractly, — should the President be enjoined from executing a law on the ground that it was unconstitutional? Had a Cherokee been arrested for administering the laws of his tribe, and taken out a *habeas corpus*, or had an action been brought against an officer of the United States for hindering the governor of Virginia or of South Carolina in the performance of his office, and the acts of Congress been pleaded or given in evidence as a justification, the question would have been presented in a strictly legal form, and the federal courts could hardly have declined to decide it on the ground that it was political.

The right to frame a purely protective tariff is another controverted question which does not admit of a judicial solution, and was left to the logic of events. For as Congress are authorized to levy taxes, duties, and imposts, and must determine on what objects they shall be laid, the motive cannot be inquired into by the courts ; and if the power is used not for the purpose of revenue, but to encourage manufactures by excluding foreign products and compelling buyers to pay a higher price for goods made here, than they would have to give abroad, the question is political, and must be decided at the polls.<sup>1</sup>

The tariff met with bitter opposition in South Carolina, which pronounced it null and void, as being an abuse of taxa-

<sup>1</sup> 4 Madison's Writings, 144.

tion for ends not contemplated in the Constitution, and arrayed her militia for the purpose of throwing open the custom-house and admitting foreign merchandise free of duty. Webster maintained the cause of union in the Senate in speeches of reasoned eloquence, and Jackson declared his intention to enforce the law in a proclamation which has few superiors among State-papers. A conflict seemed inevitable, but was averted by a compromise in Congress, which reduced the obnoxious duties and gave South Carolina an opportunity to retreat with honor, and not without a certain measure of success.

The course of the opponents of the government was the more remarkable because Calhoun, who stood at their head, had not many years before been among the prominent advocates of protection, and joined with Clay in pressing it on New England, which was disinclined to any measure that would curtail her commerce, but when the new policy was adopted, embarked with characteristic energy in manufactures, and could not withdraw her capital without loss.<sup>1</sup> The lesson taught by nullification, and the secession to which it was a prelude, is that, skilfully framed as federal government may be, it has yet, owing to the organization of the several parts, a tendency to disunion which, when passions jar and interests diverge, may prove fatal, unless corrected by the sword.

Had nullification been defended because the question lay beyond the scope of the judiciary, and an oppressed minority cannot obtain redress through the ballot-box, the argument would have been plausible, and might but for the inconsistency above adverted to, have appealed to the sympathies of mankind; but the ground taken by its advocates was that the Constitution is a "compact" to which "each State acceded as a State and was an integral party, and that, as in all other cases of compact among parties having no common judge, each party must judge for itself as well of infractions as of the mode and measure of redress."<sup>2</sup> It followed that a State might declare an obnoxious constitutional measure null and void, and sever its connection with the

<sup>1</sup> See Parton's Life of Jackson, 455, 458.

<sup>2</sup> Kentucky Resolutions, 4 Elliott's Debates, 540, 544, 546.

government which endeavored to enforce it. This doctrine, which ignored the Supreme Court and gave the Constitution as many interpreters as there are States, seems a logical inference from the Kentucky Resolutions of 1798 as drawn by Jefferson and sanctioned by Madison, but was disavowed by the latter after his withdrawal from public life. It led, as he predicted, to secession and civil war; and had it not been overruled by the sword, would have ended in the chaos which his fears anticipated.<sup>1</sup>

The instances above considered stand apart; and the just inference from the working of the Constitution as a whole is, not that our system is deficient, but that the imperfection which I have noted results from an advance that has not fully attained its object. In making the judiciary a co-ordinate branch of the government and an arbiter between the States, the United States, and the people, the framers of the Constitution took the first step in an untried path; and did more towards making a strong and efficient central power compatible with local self-government and individual freedom than had previously been accomplished, and inaugurated a method which may be adopted in other lands, and prove even more beneficial than it is at present.<sup>2</sup>

I have stated that the function of the American judiciary as interpreters of the Constitution is unprecedented; and the remark is as true as it can be of any event in the life of a man or of a nation. Most acts of a State or of an individual may, however, be traced to some antecedent; and this may certainly be said of the American Constitution relatively to the English. The right of the courts to inquire whether governmental acts are in accordance with fundamental principles seems to be unknown on the European continent, as it certainly is in France; but was established from an early period in England as a logical consequence of the infallibility of the Crown. For as the king could do no wrong, the wrongful acts of his officers were necessarily imputed to the

<sup>1</sup> Madison's letter to Everett, 3 Madison's Writings, 97, 102, 232; 4 Id. 6, 20, 291, 298, 319, 358, 419.

<sup>2</sup> *La Démocratie en Amérique*, ch. vi. pp. 163, 172.

agent; and a prosecution against the latter did not touch the honor or dignity of the Crown. The king's command was not a justification, because the king could not, in contemplation of law, have given such a command. The attainder and execution of Strafford, with his master's assent, for measures which that master had participated in or approved, may be impugned as *ex post facto*, and a usurpation of the judicial function by the legislature, but was, as Macaulay demonstrates, in accordance with the fundamental principle that the minister must answer for the king.<sup>1</sup>

The principle was of the utmost value as rendering the judicial department of the government co-ordinate with the executive, and affording a means through which the English people might peacefully achieve freedom; but it could not practically be enforced through the ordinary channels of justice. The judges were dependent on the Crown, and might be removed at pleasure, while the king's prerogative was extensive and undefined; and when it was pleaded as a justification for acts that were contrary to law, more than ordinary rectitude and manliness were needed to hold the scales of justice. Vainly did Hampden contend that the exaction of ship-money was not only a violation of Magna Charta, but forbidden by the Petition of Right, which had received the assent of the monarch by whom it was arbitrarily disregarded; the defence was set aside by subservient judges, who held that no act of Parliament could deprive the king of powers that were essential to the defence and safety of the realm, and that it was for him to decide whether the occasion required their exercise. "I never heard," said Berkeley, J., in wilful forgetfulness of Bracton's *quod rex non debet esse sub homine sed sub Deo et lege*, as cited to James by Coke,<sup>2</sup> "that *lex* was *rex*; but it is common, and most true, that *rex* is *lex*."

<sup>1</sup> See Macaulay's Essays (Hallam), i. 331 (New York), and Poindexter v. Greenhow, 114 U. S. 270, 290, for the cognate principle in the Constitution of the United States; also Rogers v. Ragendro Dalt, 13 Moore P. C. 236.

<sup>2</sup> 12 Reports, 63, 65.

The long struggle ending with the Revolution of 1688 swept these impediments from the path of justice ; and when, in the next century, a verdict of £4000 was rendered against the Secretary of State, Lord Halifax, for issuing the general warrant under which Wilkes was arrested, his house searched, and his papers seized,<sup>1</sup> the king became amenable to the law through his ministers, and it was no longer possible to question the truth of the elder Pitt's declaration that the dwelling of the humblest Englishman was secure against the power of the Crown.

The judiciary was thus raised to a level with the other departments of the government, and might declare their acts invalid ; while they, save through an impeachment or a reversal in the Lords, had severally no such control over the judges. King, Lords, and Commons, acting conjointly, were absolute, and controlled the courts ; but no act done severally by King, Lords, or Commons in excess of their powers as defined by the statute or common law, could preclude judicial inquiry or be an answer to a suit brought for redress. The judges could not set aside a warrant or commitment by the House of Commons, or inquire into the cause ;<sup>2</sup> but this was equally true of the Commons relatively to the courts, and of a collateral inquiry by one court into the proceedings of another.<sup>3</sup> In some respects the judiciary stood on a higher plane than either branch of the legislature, or the Crown, and a *habere facias possessionem* might be relied on by the sheriff as a justification for forcing the doors of a dwelling and expelling the inmates ;<sup>4</sup> while the authority of the Commons was limited to such steps as were requisite for the vindication of the freedom and security of debate, and for the exercise of their function as the grand inquest of the

<sup>1</sup> See *Wilkes v. Wood*, 19 State Trials, 1153, 3 Burrow, 17, 42; *Entinck v. Carrington*, 19 State Trials, 1030; *Boyd v. The United States*, 116 U. S. 616, 626.

<sup>2</sup> *Howard v. Gossett*, 10 Q. B. 359, 452; *Bradlaugh v. Gossett*, 12 Q. B. Div. 271, 274; 1 Smith's Leading Cases, 1101 (8 Am. ed.).

<sup>3</sup> *Howard v. Gossett*, 10 Q. B. 359, 452; *Williamson's Case*, 2 Casey, 9; 1 Smith's Leading Cases, 1158 (8 Am. ed.).

<sup>4</sup> *Semayne's Case*, 5 Coke, 91; Smith's Leading Cases, 239 (8 Am. ed.).

realm, and any resolution or order which manifestly transgressed these bounds was invalid, and might be redressed by a suit.<sup>1</sup> They might issue a warrant without cause assigned, or convict and imprison for a contempt which could it have been inquired into collaterally, would have appeared to be none: but so might the courts;<sup>2</sup> and if the power is abused by either body, the sufferer must submit, as he would to a perverse verdict or a misinterpretation of the law by a court of last resort.<sup>3</sup>

The principle that governmental acts may, like those of individuals, be brought to the test of law as administered by the judges, was thus securely established; and all that remained for the framers of the American Constitution was to render that which was true of the several parts of the English government, applicable to the government of the United States as a whole. This end was attained, not through a change in the function of the judiciary, which necessarily continued the same, but by endowing the people of the United States with the absolute authority which belongs to Parliament, and rendering the Constitution which they enacted a *lex legum*, or over-law, to which all else must yield, and which they could not alter save through Congress with the assent of three fourths of the several States as given by the State legislatures. The Constitution was thus made an integral part of every statute; and it became the duty of the courts to treat any measure that transgressed the limits which it prescribed as null and void.

The effect was to render the State governments and the government of the United States simply agents holding the same relation to the States and the Union which an English minister does to the king. The State, as Matthews, J.,

<sup>1</sup> Stockdale v. Hansard, 11 A. & E. 253.

<sup>2</sup> Brass Crosby's Case, 3 Wilson, 188; State Trials, 1138, 1148; Case of the Sheriff of Middlesex, 11 A. & E. 273; Burdett v. Abbot, 14 East, 15; Dow's Parl. R. 199; Anderson v. Dunn, 6 Wheaton, 204, 224; Kilbourn v. Thompson, 103 U. S. 168, 183; Howard v. Gossett, 10 Q. B. 39, 452; Bradlaugh v. Gossett, 12 Q. B. Div. 271; Williamson's Case, 2 Casey, 9; 1 Smith's Leading Cases, 1158, (8 Am. ed.).

<sup>3</sup> See Bradlaugh v. Gossett, 12 Q. B. Div. 271, 285.

observed in *Poindexter v. Greenhow*,<sup>1</sup> "is an ideal person, intangible, invisible, immutable," and it may be added, impeccable. "The government is an agent, and within the sphere of the agency represents the State, but outside of that is a lawless usurpation. Whatever wrong is attempted in the name of the State is consequently imputable to its government, and not to the State; for as it can speak and act only by law, whatever it does say or do must be lawful. That which is unlawful, because made so by the supreme law, the Constitution of the United States, is not the word or deed of the State, but is the mere wrong and trespass of the individual person who falsely acts and speaks in its name." I need hardly say that this fine exposition of a principle which is common to both countries, is equally applicable to the relations of the General Government to the people of the United States. Novel and extraordinary as the powers of an American judge to treat a statute or the command of the chief magistrate as nugatory, may at first sight appear, it is therefore simply an application of a doctrine that has long borne fruit in England, and is still more beneficial here.

Whether the command relied on as a justification for an invasion of liberty or property proceeds from a general in the field or the President, from a State legislature or from Congress, the controversy is not with the State or the United States, but between the wrong-doer and the party who suffers from the wrong. It therefore follows the customary course; and if the command is contrary to the Constitution or illegal, the defence will fail.<sup>2</sup> Here the American and English Constitutions are practically at one, and the maxim *ubi jus ibi remedium* is carried out by giving every man a remedy, regardless of the source from which the aggression comes;<sup>3</sup> the difference being that an act of Parliament cannot fall within the principle as an act of Congress or of a State legislature may.<sup>4</sup>

<sup>1</sup> 114 U. S. 270, 290.      <sup>2</sup> *Poindexter v. Greenhow*, 114 U. S. 270, 288.

<sup>3</sup> Dicey, *Law of the Constitution*, 222, 311, 313; *Kilbourn v. Thompson*, 103 U. S. 168.

<sup>4</sup> *The United States v. Lee*, 106 U. S. 196; *Poindexter v. Greenhow*,

No such result could well have followed had this country been colonized from France, where such a proceeding as that instituted by Wilkes against Lord Halifax is unprecedented, and a minister of State can no more be mulcted in damages at the present day in the ordinary course of justice for an act

114 Id. 270, 288; *Boyd v. The United States*, 116 Id. 616; *Little v. Barreme*, 2 Cranch, 170, 178; *Gelston v. Hoyt*, 3 Wheaton, 248; *Mitchell v. Harmony*, 13 Howard, 115; *United States v. Carr*, 1 Wood, 480; *Commonwealth v. Blodgett*, 12 Metcalf, 56. Intolerance of official tyranny and a resolve that persons who suffered from it should have redress in the ordinary course of law, which prompted the resistance to general warrants, appear conspicuously in the leading case of *Mostyn v. Fabrigas*, Cowper, 161; 1 Smith's Leading Cases, 1027 (8 Am. ed.). The action was trespass against the Governor of Minorca for the arrest of a Minorcan, imprisoning him for six days and banishing him for a year from the island. The jury rendered a verdict for £4000, which was sustained by the Court of Common Pleas, and subsequently on a writ of error by Lord Mansfield in one of the many admirable judgments which show that Pope did not err in saying that much was lost to letters when Murray chose the path of jurisprudence. It was contended for the defence that the Governor was the civil and military head of the island, and that as the Arraval of St. Philips, where the arrest occurred, was a fortified place absolutely under his control, where no court could sit without his permission, it was for him to decide what discipline and security required, and he should not be made answerable for a defect of judgment. Lord Mansfield said, in delivering judgment: "It has been insisted that supposing an action will lie for an injury of this kind committed by one individual against another in a country beyond the seas but within the dominion of the Crown of England, yet it shall not emphatically lie against the Governor. In answer to which I say that for many reasons, if it did not lie against any other man, it shall emphatically lie against the Governor. . . . If the king's court of justice cannot hold plea in such a case, no other court can do it. For it is truly said that the Governor is in the nature of a viceroy; and therefore locally during his government no civil or criminal action will lie against him: the reason is that upon process he might be subject to imprisonment. But here the injury is said to have happened in the Arraval of St. Philips, where without his leave no jurisdiction can exist. If that be so, there can be no remedy whatsoever if it is not in the king's courts. . . . In *Way v. Yally*, 6 Mod. 195, Justice Powell says, that an action of false imprisonment has been brought here against the Governor of Jamaica for an imprisonment there. . . . I remember, early in my time, being counsel in an action brought by a carpenter in the train of artillery against Governor Sabine, who was governor of Gibraltar, and who had barely confirmed the sentence of a

done in the administration of the government than he could have been under the reign of Louis XIV.

Notwithstanding the *liberté, égalité, fraternité* which the Republic has taken as her device, her officers and agents do not stand on the same level before the law as their fellow-citizens, and may, when called to account for the wrongs done in their administrative capacity, have the case removed to tribunals which are commissions rather than courts, and look on the offence from a governmental point of view, and decide in a different spirit from that which influences ordinary judges.<sup>2</sup> The privilege extends beyond governmental acts and acts done under color of an authority from the government which it has not conferred, to injuries inflicted incidentally by "an official in the discharge of his official duties." "Thus if a cavalry officer when under orders rides from one place to another at a review and knocks down A, a spectator, A cannot bring an action in the ordinary courts."<sup>3</sup> So if a policeman is charged with a trespass and assault and battery committed by breaking into a monastery, seizing the property of the inmates, and turning them out of doors, and relies on an order from his superior as a justification, the case gives rise to a conflict of

court-martial by which the plaintiff had been tried and sentenced to be whipped. The Governor was very ably defended, but nobody ever thought that the action would not lie; and it being proved at the trial that the tradesmen who follow the train are not liable to martial law, the court were of that opinion, and the jury accordingly found the defendant guilty of the trespass, as having had a share in the sentence, and gave £500 damages." I may add that in *Hill v. Bigges*, 3 Moore (Privy Council), 465, Lord Brougham seems to have been of opinion that Lord Mansfield went too far in stating that a governor is not locally liable to an action, and said, in giving judgment: "It is not at all necessary that in holding a governor liable to be sued, we should hold his person liable to arrest while resident in his government." 1 Smith's Leading Cases, 1060 (8 Am. ed.).

<sup>1</sup> De Tocqueville, *L'Ancien Régime et la Révolution*, vol. i. ch. iv., v., vi., pp. 103, 109, 115, 117; Dicey, *Law of the Constitution*, 195, 224.

<sup>2</sup> De Tocqueville, *L'Ancien Régime et la Révolution*, vol. i.; De Tocqueville, *Democracy in America* (trans.); Dicey, *Law of the Constitution*, 189, 2d ed.

<sup>3</sup> Dicey, *Law of the Constitution*, Lect. v. p. 192.

jurisdiction and is referred to a body known as the *tribunal des conflits*, which determines whether he shall be heard by the civil or the administrative tribunals.

The protection given to the official class in France under all forms of government is shown by the following citation from De Tocqueville's *Democracy in America*:—

“In the Year VIII. of the French Republic a Constitution was drawn up in which the following clause was introduced: ‘Art. 75. All the agents of the government below the rank of ministers can be prosecuted for offences relating to their several functions only by virtue of a decree of the Conseil d’État, in which case the prosecution takes place before the ordinary tribunals.’ This clause survived the ‘Constitution de l’An VIII.,’ and it is still maintained, in spite of the just complaints of the nation. I have always found the utmost difficulty in explaining its meaning to Englishmen or Americans. They were at once led to conclude that the Conseil d’État in France was a great tribunal established in the centre of the kingdom, which exercised a preliminary and somewhat tyrannical jurisdiction in all political causes. But when I told them that the Conseil d’État was not a judicial body, in the common sense of the term, but an administrative council composed of men dependent on the Crown, so that the king, after having ordered one of his servants, called a prefect, to commit an injustice, has the power of commanding another of his servants, called a counsellor of State, to prevent the former from being punished; when I demonstrated to them that the citizen who has been injured by the order of the sovereign is obliged to solicit from the sovereign permission to obtain redress,—they refused to credit so flagrant an abuse, and were tempted to accuse me of falsehood or of ignorance. It frequently happened before the Revolution that a parliament issued a warrant against a public officer who had committed an offence, and sometimes the proceedings were stopped by the authority of the Crown, which enforced compliance with its absolute and despotic will. It is painful to perceive how much lower we are sunk than our forefathers, since we allow things to pass under the color of justice and the

sanction of the law which violence alone could impose upon them.”<sup>1</sup>

Men do not change the ideas which have been generated under a form of government which has endured for centuries, on its overthrow;<sup>2</sup> and Article 75, which De Tocqueville treats with such just severity, was an inheritance from the “ancien régime,” which was careful to screen its functionaries from the prosecutions that might render them less serviceable.<sup>3</sup> It was repealed on the downfall of Napoleon III. by the Provisional Government; but the end is attained through the *tribunal des conflits*, though with more regard for the forms of justice.<sup>4</sup>

It is not surprising that a system which is so entirely foreign to the genius of the common law should appear incomprehensible to Englishmen and Americans. It stands in marked contrast to the theory and practice of the English Government, which, when Massachusetts was on the eve of revolt, allowed the officers and men who had fired with fatal effect on the mob which was assailing the guardhouse, to be tried by a Boston jury, although the inhabitants of the town were much incensed, and could not be supposed to view the occurrence with impartial eyes. The conduct of the ministry in this regard may be viewed as a proof that the Stamp Act proceeded from an error of judgment rather than a fixed design to crush the liberties of the Colonies; and the

<sup>1</sup> De Tocqueville, *Democracy in America* (translation), vol. i. ch. vii. p. 131 (Cambridge, Mass., 1862); Dicey, *Law of the Constitution*, 193.

<sup>2</sup> Dicey, *Law of the Constitution*, ch. v. p. 172.

<sup>3</sup> *L'Ancien Régime et la Révolution*, ch. iv., v., iv., 103, 109, 115, 117.

<sup>4</sup> The causeless arrest and brutal treatment of two English tourists by a French brigadier, as reported in *Macmillan's Magazine* for January, 1887, gives an idea of the petty though vexatious tyranny arising out of the exemption of the official class from responsibility in the ordinary course of law. Were such a wrong done in England or the United States, a suit would be brought for false imprisonment, and a verdict rendered for heavy damages, and if the amount was not paid, the defendant might be arrested upon a *capias* and confined until discharged by an insolvent court; but no redress could be obtained in France. See *Littell's Living Age*, Feb. 19, 1887.

jury justified the confidence reposed in them by a verdict of acquittal.

The conception of the sovereign as not only above the law, but entitled to shield his servants when called to account for acts done on his behalf, has been familiar to despotism in all ages, and may, as the example of France proves, be adopted in an obnoxious form by a republic. The question which it involves is, Shall there be one law for the government and another for the people? or, to state the point somewhat differently, Shall an individual who is wronged by the government be denied the means of redress which he would have if the injury were inflicted by a fellow-citizen? It was a vital point in the long struggle of the English people for freedom, because the bounds of the royal power were of little moment if when they were exceeded, and a suit was brought for redress, it could be defeated on the plea that the act was done on behalf of the king, and the proceeding was in effect against him.<sup>1</sup> Such was virtually the ground taken in *Lee v. The United States*,<sup>2</sup> where it was contended that if an ejectment or replevin was brought to regain the possession of goods or land, and the Attorney-General intimated that they were taken and withheld at the command of the President or under an act of Congress, the court must stay the proceeding, although the seizure was confessedly illegal. The contention was, fortunately, overruled by a majority of one; and when a like defence was set up in *Poindexter v. Greenhow*,<sup>3</sup> on behalf of the State of Virginia, judgment was rendered for the plaintiff by a divided court. The question may now be regarded as resolved in favor of freedom; and the only break that I am aware of in the chain of decisions is *Hartranft's Appeal*,<sup>4</sup> where the Supreme Court of Pennsylvania held not only that the Governor of Pennsylvania might decline to appear in obedience to a subpoena and testify what had occurred while the troops were acting under his orders for the suppression of a riot, but that the privilege was shared by his aides-de-camp.

<sup>1</sup> Dicey, *Law of the Constitution*, 206, 208.

<sup>2</sup> 106 U. S.

<sup>3</sup> 114 U. S. 270.

<sup>4</sup> 85 Pa. 433.

The former point may have been well taken, because the chief magistrate of a State is entitled to decide whether his official duties admit of his absence from the seat of government, and he might, if he were subject to process, be imprisoned;<sup>1</sup> but it is not easy to discover any ground for the latter. A governor, like the President, cannot be compelled to explain before a judicial tribunal why he thought it necessary to call out the militia,<sup>2</sup> or exercise any other power conferred on him by the Constitution, but should, as it would seem, be willing to state what he did or witnessed while acting as commander-in-chief, so far as it bears on any question that concerns the property or liberty of a citizen; and such is certainly the duty of his subordinates, whether dressed in uniform or wearing a civil garb. As there was no indictment or specific charge before the grand jury, and the investigation on which they had entered was political rather than judicial, they might have asked many questions which the aides-de-camp could not have been compelled to answer; but this did not justify the refusal to attend.

<sup>1</sup> *Mostyn v. Fabrigas*, Cowper, 161; 1 Smith's Leading Cases, 1038, 1060; *Hall v. Bigge*, 3 Moore, P. C. 465; *ante*, p. 141.

<sup>2</sup> *Thompson v. The German Valley R. R.*, 22 N. J. Equity, 111; *Hartman's Appeal*, 4 Norris, 433, 446.

## LECTURE IX.

The English Constitution. — Its Relation to the Constitution of the United States. — The Ancient Powers of the King, the Lords, and the Commons. — The Early and Persistent Development of Representative Government in England contrasted with its Failure or Suppression in France and Spain. — The Relation of the Legislature to the Judiciary in England and in France. — The *Curia Regis* and its Division into the Exchequer, King's Bench, and Common Pleas, compared with the *Cour du Roi* and its Transformation into the Parliament of Paris. — The Privy Council. — The Star Chamber. — The Relation of the King to the Judiciary.

I PROPOSE in the following pages to give some account of the growth and development of the English Constitution, and contrast its distinctive features with those of the government under which we live.

It has often been said that the design of the Constitution of the United States was drawn from the English Constitution; and there is a general, or what may be termed family, resemblance in the structure of the two governments which is too close to be fortuitous, and shows that the remark is just. It is not less plain that this likeness is attended with great and essential differences, resulting not so much from choice as from the force of circumstances which rendered the institutions of the mother-country inapplicable here. The comparison is the more difficult because the English Constitution is not a constant quantity. Like the glacier, which though seemingly fixed and rigid is yet plastic, and suffers a continual change, it has varied in each century, and sometimes with each successive generation. The system which prevailed under the Tudors differed essentially from that which was established at the Revolution in 1688, and this has been

subjected in our own times to almost as great a change. It is therefore important, in reasoning from English institutions to our own, to remember that the government under which our forefathers were born, and from which they derived their ideas of constitutional freedom, was not identical with that which exists in England at the present day. The origin and development of the English Constitution are consequently a study which should be cultivated by every American, not only for its intrinsic value, but for the light which it sheds on the laws and institutions of the United States.

The government of the United States is essentially limited. If this may also be said of the English government, the extent and nature of the restraints are in many respects different. The English government was, in the form which it assumed in the reign of Edward I. and retained for centuries, limited by the mode in which authority was distributed among the several parts. The king had no power to make, abrogate, or even interpret the law.<sup>1</sup> Parliament could not legislate without the concurrence of the Crown. The executive power resided in the king, and subordinately in the officers and magistrates whom he appointed. He was then in fact, as he still is theoretically, the commander-in-chief who led the feudal array and the militia of the shires for the defence of the realm or to foreign conquest, and he was also the chief magistrate to whom belonged the duty of seeing that the laws were enforced. On the qualities or defects, the vigor or imbecility, of the monarch, depended the repose, the safety, the greatness of the kingdom. If Henry V. or Queen Elizabeth could raise England to a foremost place among the nations, she might be no less depressed by a Henry VI. or Charles II. Still, the king could not engage successfully in any great or protracted enterprise, or provide effectually against invasion, without the aid of Parliament. It was not merely that the right of levying taxes lay with the Lords and Commons. They were, as every king of England who per-

<sup>1</sup> *Prohibitions del Roy*, 12 Reports, 63, 74; Campbell's *Lives of the Chief-Justices*, 271, 275.

sistently transgressed the limits set by the Constitution found to his cost, superior in military strength to any force that could be mustered by the Crown. It was, moreover, the singular merit of the English Constitution, as it existed in those earlier times, that while the Upper and Lower Houses were diverse, and counterpoised each other as well as the power of the Crown, they were yet, thanks to the high-spirited knights who represented the shires and formed a connecting link between the aristocracy and the people, rarely disunited when grievances were to be redressed, a profligate minister punished, or a feeble or unworthy monarch deposed. As no material change could be made in the laws without their concurrence, so it was not easy to resist any legislative reform on which they insisted ; and they had in the right of the Commons to impeach, and of the Peers to convict and sentence, a weapon of which all public men stood in awe, and which, though grossly abused, was on the whole favorable to liberty and good government.

The laws were originally promulgated by the king, with the advice and consent of Parliament;<sup>1</sup> but the legislative power gradually passed from his hands to those of the Lords and Commons. This was not merely an outgrowth of Teutonic and Scandinavian freedom, but resulted from the feudal organization which defined the obligations of the subject and made his concurrence essential to a change. So the king's dues, as lord paramount, were fixed by custom, and could not rightfully be increased without the consent of those who held of him as tenants. The Great Charter accordingly declared that except "for ransoming our body, making our first-born son a knight, and for once marrying our eldest daughter, no scutage or aid shall be imposed save by the Common Council of the realm."<sup>2</sup> And although this clause was omitted from the Charter as re-issued in the reign of Henry III., it was measurably re-enacted by Edward I. and became an integral though often violated part of the Con-

<sup>1</sup> 2 Parliamentary History, 365; 1 Green's History of the English People, 461.

<sup>2</sup> Stubbs' Documents, 290.

stitution.<sup>1</sup> Parliament thus acquired the power of taxation, — which is the key to every other, — and with it ultimately the entire control of the government.

The king originally exercised a somewhat arbitrary discretion in summoning the Great Council (which was the source of Parliament), and might convene his creatures or dependents, to the exclusion of the persons whom the custom of the realm and their position best entitled to be present. Magna Charta guarded against this abuse by providing that the prelates and greater barons should be summoned by writ, and that all tenants *in capite* should have forty days' notice, through the sheriffs and bailiffs of their respective counties. The holder in chief of a single knight's fee seems to have been as much entitled to share in the deliberations of the Great Council, of common right and by virtue of this clause, as the most powerful earl. *Baron* was simply Norman-French for "man," and the king's men, or tenants *in capite*, were "barons," whether their holding was limited to a few acres or extended over half a county. But the lesser barons were slow to avail themselves of a costly and laborious privilege, and assembled in their respective counties to ratify or assess the grants made by the great lords.<sup>2</sup>

The Great Council as thus constituted, like the *Witenagemote* of the Saxon kings and the biennial meetings of the Franks under Charlemagne, was an assembly of notables, or rather of the classes which then bore sway in Europe,<sup>3</sup> and may be likened to the *populus* of the early days of Rome, which, although a comparatively small portion of the inhabitants, was yet the only people recognized by the law. It was not a representative assembly except in the sense in which a part of a political body may act for the whole, or a quorum be held to represent the House of Commons.<sup>4</sup> Those who came, spoke for themselves, and their votes were not, as it

<sup>1</sup> 1 Green's History of the English People, 290; 2 Institutes, 529.

<sup>2</sup> Stubbs' Constitutional History of England, sections 123, 124, 190, 201.

<sup>3</sup> Thierry, *Lettres sur l'Histoire de France*, lettre xxv. pp. 294, 297.

<sup>4</sup> Guizot's Representative Government, Part I., lecture xx.; Part II., lecture iv.

would seem, necessarily binding on others who remained at home.<sup>1</sup>

Fortunately the English prelates and nobles were not unworthy of their exalted trust, and had, as Magna Charta abundantly shows, a catholic regard for human rights which was singular in that age, and would have been admirable in any epoch. But for this liberal temper the prejudices of caste would hardly have been overcome, and the way prepared for seating the burgher as the representative of his town side by side with the belted knight. The change was gradual, and resulted not so much from design as from the exigences of the struggle between the baronage and the Crown, which lasted throughout the greater part of the thirteenth century, and made both parties desirous of popular support.

The County Court was then a centre of political life in England, where the freeholders met at the call of the sheriff to exercise their customary privileges and respond to the demands made on behalf of the king. Not only were conservators of the peace chosen in each county by a popular vote, but the statute of Westminster and the *Articuli super Chartas*, passed in the fifth and twenty-eighth years of Edward I., provided for the election of sheriffs and coroners; and it was also enacted that the Great Charter and the Charter of the Forest should be read four times in the year before the assembled people in each county, and that they should choose "three substantial men to hear and determine such complaints as shall be made upon all those that commit or offend against any point contained in the aforesaid charters."<sup>2</sup>

It is not, therefore, surprising that during the contest for freedom which signalized the reigns of John and Henry III., knights should have been summoned from each shire to Par-

<sup>1</sup> Stubbs' Constitutional History of England, sections 190, 201, 208. Agreeably to Guizot, the tenants *in capite* exercised the right of levying imposts on all the proprietors in the kingdom (Guizot's Representative Government, Part II., lecture xi.); but there seems to have been no settled rule.

<sup>2</sup> 2 Institutes, 174, 176, 538, 558, 559. Statute of Westminster I. c. 10; Articuli super Chartas, c. 1, 8.

liament, who, although elected in the first instance by the tenants-in-chief, were soon afterwards voted for by the great body of the freeholders. Representatives were first chosen by the boroughs at the call of Simon de Montfort in 1266; but it was not until the close of the century, during the last years of Edward I., that their presence became a customary and established right.<sup>1</sup> Then, and for some time afterwards, Parliament was but a single body; and its division into two branches dates from the reign of Edward III., when the knights and burgesses coalesced to form the lower house.<sup>2</sup>

It was this admixture of the aristocratic and civic elements which gave its distinctive character to the House of Commons and conduced more than any other feature to the development of the Constitution. The knights of the shire were for the greater part not less well-descended than the peers, and some of them could boast a more ancient lineage. They it was who gave the edge and temper requisite for the long contest with the Crown, and kept the lower house in unison with the upper; while the representatives of the boroughs checked the tendency to class legislation, and were at times a salutary support to the throne.<sup>3</sup>

The substitution of delegates for the popular assemblies of the Anglo-Saxons, Franks, and other Germanic tribes was not peculiar to England, but the result of causes which were more or less effectually at work throughout Western Europe, and gave the Middle Ages an energy and a freedom that were wanting to the Renaissance, notwithstanding its "sweetness and light."<sup>4</sup> Power was distributed among the Church, the Crown, the barons, and the free cities or communes; and their

<sup>1</sup> 1 Green's History of the English People, 354, 358.

<sup>2</sup> 2 Institutes, 267; 1 Green's History of the English People, 414.

<sup>3</sup> A principal cause of this result was that the English gentry were not, like the corresponding class on the Continent, a caste separated by an insuperable barrier and distinguished by peculiar privileges. On the death of an earl or a baron, the title descended, with the estate to his eldest son; but the younger children were, with the rest of the untitled gentry, merely commoners and equal before the law with the humblest freeholder.

<sup>4</sup> Thierry, *Lettres sur l'Histoire de France*, 153, 299; *Lettres* 13-25, I., II., III.

antagonism evoked the manly qualities that are essential to freedom, with a fulness not easily paralleled in peaceful times. Unfortunately, the lesson, save in England, was taught to classes, and not to the nation as a whole; and the Crown, as representing the whole people, finally became predominant.<sup>1</sup> The manliness, the energy, the perseverance, and the love of freedom which had been called forth during this long struggle did not, however, sink in the ground, and it is not surprising that a race so nurtured should have risen in the succeeding centuries to the pinnacles of science, literature, and art.

The germ of representative institutions was inherent in the Teutonic race, and fructified wherever circumstances favored its growth. Nothing is more just than Madame de Staël's saying, that liberty in Europe is from of old, despotism of yesterday.<sup>2</sup> Philippe le Bel manifested his sense of the aid to be derived from popular opinion by summoning the deputies of the towns to the assembly of the States-General which he convened in 1302 as a means of enlisting the nation on his side in his mortal quarrel with Boniface VIII.; and they sat in the Castilian Cortes in the beginning of the twelfth century, and in that of Aragon at a much earlier period. The liberties of Aragon were indeed established on a firmer basis, and attended with stronger guarantees than those of England or any other European kingdom,<sup>3</sup> and would presumably have been maintained by the high spirit and sagacious patriotism of the Aragonese, but for a singular concurrence of adverse causes. One of these was the conquest and absorption of southern Spain, and with it of a mongrel race, which, though not wanting in culture and refinement, was yet accustomed to despotic rule, and had never practised the difficult art of self-government.<sup>4</sup> Another

<sup>1</sup> Thierry, *Lettres sur l'Histoire de France*; *History of the Tiers Etat*, 1, 111; Guizot, *History of Civilization in France*; Sismondi, *History of the Italian Republics*.

<sup>2</sup> See Mignet, *La Féodalité*, première partie, ch. i. note 11.

<sup>3</sup> Introduction to Robertson's *History of Charles V.*, sec. 30.

<sup>4</sup> Had the Moors been truly civilized, Morocco, whence they came, and to which many hundreds of thousands returned after the re-conquest, would not have remained in a semi-barbarous condition.

and not less potent influence was the ominous, though seemingly fortunate, marriages through which the various Spanish States were consolidated, and finally became part of a gigantic empire under the arbitrary sway of Charles V. and his bigoted successor. Moreover, the Castilian nobles, who, like the French, seem to have been indifferent to political liberty, and careful only for the distinction to be acquired in courts and camps, acquiesced in their exclusion from the Cortes in 1438 on the pretext that they should not take part in voting imposts from which they were exempt; and the towns, left to their own resources, were shorn of their privileges, and finally succumbed to the arms of Charles V., after an unavailing revolt led by the heroic Juan de Padilla.<sup>1</sup> The Emperor used his victory with moderation, and occasionally convened the Cortes, which gave more than one proof that it had not entirely lost its ancient spirit; but its consideration and influence constantly declined, and during the reign of his successor it ceased to have any real significance. Freedom could hardly endure in Aragon after it had ceased to exist in the rest of the peninsula; but it was not extinguished until the close of the reign of Philip II., and was conceded to the obscure Basque provinces by kings who felt secure in the loyalty of the inhabitants.

Far different was the course of events in England, where representative government escaped the dangers which proved fatal to it in Continental Europe, and came down in an unbroken line as the birthright of the Anglo-Saxon race on both sides of the Atlantic. This result was, as I have elsewhere remarked, largely due to the good sense and patriotism of the English gentry, who laid aside the pride of birth and coalesced with the burghers to form in the House of Commons the most enduring bulwark that freedom has ever had in any age or country.<sup>2</sup>

<sup>1</sup> See Hamel, *Histoire Constitutionnelle de la Monarchie Espagnole*, ch. ii. pp. 213, ch. iii. p. 258; Robertson's *History of Charles V.*, book iii.; and Chatham's remarks in 1770 in the House of Lords, Thackeray's *Life of Chatham*, sec. 2, p. 18.

<sup>2</sup> Mr. Freeman insists on the continuity of English freedom as con-

Had not the battle against arbitrary power been fought from age to age in Parliament, free institutions would hardly

trusted with the course of events in France, and that the Council of the Norman and Angevin kings was the lineal descendant of the *Witenagemote* as that came from the popular assemblies so graphically described by Tacitus. There can be little doubt, however, that the Constitution of the Great Council was essentially feudal, and that the Parliament which assembled at the summons of Philip Augustus to try and condemn King John, was analogous to the Parliament which John held at Westminster, each consisting of the tenants *in capite*, who held immediately of the Crown, and such others as the king might see fit to call in as advisers. Still, the feudal system was itself of Teutonic origin, though moulded by the force of circumstances, and arose from the customs and modes of thought which the German warrior brought from his ancestral forests to the lands which he subdued and colonized. Freeman's *Growth of the English Constitution*, ch. ii. p. 91.

We may also believe, notwithstanding the view taken by Mr. Freeman, that the convocation of the States-General by Philip the Fair was not due to a theoretic desire for change, but resulted from the same causes which led Edward I. to follow the lesson set by Simon de Montfort, by giving the representatives of the English boroughs a seat in the House of Commons. Thierry, *History of the Tiers Etat*, ch. ii. p. 61. The *Tiers Etat* had grown in strength and consideration on both sides of the Channel, and it was important for the Crown to secure the moral support of a body which had repeatedly shown that it could render material aid both with subsidies and arms. Thierry, *Lettres sur l'Histoire de France*, lettre 1, xxv. 17, 299.

"The kings of France found in the cities reconstituted in municipal form what the citizen renders to the State, but what the barons would not or could not render, — a real submission, regular subsidies, a militia capable of discipline." *History of the Tiers Etat*, ch. ii. p. 63; translated by the Rev. T. B. Wells, p. 47. Whatever was essayed in England with a view to economy and order in the collection and expenditure of the revenue, and imposing a restraint on the arbitrary power of the Crown, was also attempted in France, though with a less fortunate result. *History of the Tiers Etat*, ch. ii. pp. 63, 69.

The failure may be ascribed to two causes, — one, the instability of the Celtic race, who were loyal to persons rather than principles; the other, the effect of Roman domination in extinguishing the capacity for self-government. The difference of race kept the nobility and people asunder, and prevented that sincere co-operation of the various orders which had a marked and beneficent influence on the growth of English freedom. *History of the Tiers Etat*, ch. vii. pp. 224, 243. See Sully's *Memoirs* for the ingenious device by which that sagacious minister frustrated the

have taken root here, or been successfully vindicated in the War of Independence. In renouncing our allegiance to George III. we simply followed the line of precedents, which, beginning with the revolt that extorted Magna Charta, and including the deposition of Richard II. and Charles I., led to the Revolution of 1688 and the final expulsion of the Stuarts. Washington is ours; but he was the successor of a long roll of worthies, who, in establishing the principle that taxation should not be imposed without representation, prepared the way for the edifice of constitutional freedom in lands that were as yet unknown.

The value of a method through which the citizens of an extensive and densely peopled country may control the conduct of public affairs without the disorders that must inevitably ensue where the masses are convened to consider questions which concern their feelings and interests, may be regarded as the most fortunate political discovery of any age. By enabling the people of an entire country to unite under one political head without forfeiting their freedom, it has done more to elevate mankind than all the boasted invention of the Notables under Henri IV. to obtain some control over the finances.

It may appear singular that tribes so nearly akin as were the conquerors of Gaul and Britain, and whose institutions were so much alike in the eighth and as late as the twelfth century, should have diverged so widely in after years. The cause was not that the Anglo-Saxons were superior to the other Germanic tribes, but that they formed the bulk of the people who were subsequently known as Englishmen; while the conquering race was in France a merely superficial layer, and the great body of the population consisted of Gallo-Romans long inured to servitude and who had forgotten the very name of freedom. No such union, therefore, was possible as that which fused Norman and Saxon into one people, and rendered the knight of the shire willing to sit in the House of Commons. Thierry, *History of the Tiers Etat*, ch. vii. pp. 237, 243, 250. Certainly no race ever gave greater proofs of vitality and endurance than did the Franks; and their biennial assemblies were as clearly offshoots of the popular meetings of the Germanic tribes as was the *Witenagemote* of the Anglo-Saxons. Had the energy which was so lavishly expended under Charlemagne over the vast area extending from the Apennines and Pyrenees to the German Ocean been confined within narrower limits, the political destiny of France might have been akin to that of England.

tions of modern science. Such a result was unknown to antiquity, where liberty was incompatible with an enlargement of the State that would render it impracticable for the citizens to assemble within the city walls for deliberation or defence. The inhabitants of Attica, or of so much of the Campagna as constituted the territory of early Rome, might meet in the market-place and proceed to a choice that would be intelligently made and express the deliberate opinion of the majority, especially where they were organized as at Rome, and voted by centuries or tribes; but no such result was possible after the right of citizenship had been disseminated by grant or colonization throughout Italy and beyond the sea. Personally, the privilege was of the utmost value; but its political effect was neutralized by the impossibility of bringing such a mass of voters to the capital, and of their proceeding deliberatively when there; and the suffrage practically devolved on the populace of the Forum. Had the conception of an assembly composed of delegates from the Italian towns occurred to the Gracchi or been entertained by Marius, the Social War might have been averted, or attended with happier results, and civilization, purified by Christianity, have been handed down in an unbroken line to modern times.

Such a plan would have seemed visionary to the factions on either side; and the conviction that liberty and union, which have been happily allied in our own land, were irreconcilable, contributed to keep the States of Italy and Greece, and the republics of the Middle Ages, at a jealous distance, until they were finally consolidated by the sword.<sup>1</sup>

If we now turn from the department which enacts to that which interprets and applies the law, it will appear that the judiciary could not until a comparatively recent period be regarded as a distinct or independent department of the English government. To comprehend its origin we must go back to the *Aula Regia*, where the legislative, financial, and judi-

<sup>1</sup> Among the nations of antiquity the extension of the State was incompatible with the progress of civilization; either the State must be dislocated, or a despotism would prevail. Guizot's Representative Government, lecture x. p. 124 (London, 1852).

cial business of the State were administered by the king, with the advice or consent of an assembly known as the Great, or Common, Council.<sup>1</sup> This consisted of the prelates, the tenants *in capite* or barons, the great officers of the realm, and such other persons as the king saw fit to summon, in view of their experience, influence, or legal knowledge.<sup>2</sup>

Its functions were not legally or accurately defined, but varied with the occasion; and as the country passed from the absolute rule of William the Conqueror to a limited monarchy under Edward III., there was a constant and increasing tendency to the organization without which power cannot well be efficient. The barons would not necessarily be convened for judgment unless the plaintiff or defendant was a tenant *in capite*; the jurists took no part in the grant of aids or subsidies; and neither body would ordinarily be consulted when the question was one of expenditure or administration. Still, the presence of men learned in the law might be serviceable to the Crown in cases where they could not vote, and the barons might insist on making their voice heard when alliances were to be contracted, war declared, or grievances redressed.<sup>3</sup> Like the analogous body which gave birth to the Parliament of Paris, the Great Council was by turns a court, a legislative assembly, and a committee for auditing the public accounts and supervising the collection of the revenue.<sup>4</sup> Such a multiplicity of functions was necessarily disadvantageous, and convenience and policy required the establishment of tribunals which should be exclusively engaged in administering justice and punishing offences against the Crown.

<sup>1</sup> Stubbs' Constitutional History of England, vol. i. ch. xi. p. 372; ch. xiii. p. 598.

<sup>2</sup> See Stubbs' Constitutional History of England, vol. ii. ch. xv. pp. 258, 259; vol. iii. ch. i. pp. 395, 445.

<sup>3</sup> Stubbs' Constitutional History of England, vol. i. ch. xi. p. 352. On the cognate question of the origin and transformation of La Cour du Roi into the French Parliament, see Faure, Histoire de St. Louis, vol. ii. livre viii. p. 332; Mignet, La Féodalité, partie 2, pp. 120, 122.

<sup>4</sup> Mignet, La Féodalité, partie 2, ch. v. pp. 120, 129; Faure, Histoire de St. Louis, ii. 334; Stubbs' Constitutional History of England, vol. ii. ch. xv. p. 265; Thierry, Lettres sur l'Histoire de France, 298.

The jurists were seemingly at first summoned as auditors to hear and report rather than determine,<sup>1</sup> but soon acquired a definite position as judges. The *Curia Regis* was in the earlier years of Henry II. still a branch of the Great Council, with a numerous staff of justices,<sup>2</sup> who were soon afterwards, and probably in the same reign, distributed among three distinct tribunals, designated as the Exchequer, the King's Bench, and the Common Pleas, the first taking charge of questions which concerned the revenue; the second administering criminal justice; and the third being intrusted with the determination of controversies between man and man, which in that age principally concerned the land. This change, which was the reverse of that which occurred in France, where the barons withdrew from the Parliament and left the jurists in possession of the field,<sup>3</sup> did not necessarily or at once lessen the personal authority of the king. If the Common Pleas were, as a well-known clause of Magna Charta required, held at a fixed and certain place, the King's Bench followed the court, and was a ready instrument in the royal hand.<sup>4</sup> The king still was really what he continues to be theoretically, *justiciarius regni*,—the fountain-head of justice; and the judges sat as his delegates and were removable at pleasure.<sup>5</sup> As he had presided in the *Aula Regia*, so he was still constructively present in the courts which were its offshoots, the parties were summoned by writs running in his name, and he might, and sometimes actually did, take his seat on the bench while the case was under trial or argument, and influence, if he did not dictate, the decision.<sup>6</sup> "Kings," said Mr.

<sup>1</sup> Mignet, *La Féodalité*, partie 2, p. 125; Stubbs' *Constitutional History of England*, vol. i. sec. 231, p. 262.

<sup>2</sup> Stubbs' *Constitutional History of England*, vol. i. p. 598.

<sup>3</sup> Thierry, *History of the Tiers Etat*, ch. ii. p. 57 (London, 1855); Faure, *Histoire de St. Louis*, vol. ii. livre viii. pp. 333, 334; Mignet, *La Féodalité*, partie 2, ch. v. p. 125.

<sup>4</sup> *Articuli super Chartas*, c. 5, 551.

<sup>5</sup> 2 *Parliamentary History*, 303, 318; Stubbs' *Constitutional History of England*, vol. i. ch. xi. pp. 387, 388; 3 *Green's History of the English People*, 94.

<sup>6</sup> 2 *Parliamentary History*, 322; 12 *Coke*, 63.

Littleton, in his speech at the conference between the Houses on the liberty of the subject, in the third Parliament of Charles I., "have sitten in their beds of justice, as Edward VI. did on a trial for rape in the King's Bench;" and although he was careful to add that Edward did not pronounce the sentence, but left it to his justices,<sup>1</sup> there can be no doubt that at an earlier period the judicial function was not only formally, but actually, exercised by the king.<sup>2</sup> William the Conqueror heard causes in person, and so, we are told, did Henry II.;<sup>3</sup> and a well-known passage in Coke's Reports would seem to indicate that Richard II., if not Henry VII., should be added to the list.<sup>4</sup> The right to judge is indeed as much an attribute of kingship, as conceived in the earlier stages of most nations, as the power to command, and the doctrine that it must be exercised vicariously a growth of after times. Moreover, while it was an established principle of the feudal system, confirmed by Magna Charta, that each man should be judged by his peers, it was the privilege of the king as chief lord, to hold the court and preside personally or by deputy over its deliberations.<sup>5</sup> St. Louis sitting as judge under the great oak of Vincennes, is accordingly a scene on which French historians delight to dwell;<sup>6</sup> and a like right was claimed in England as a branch of the prerogative, as late as the beginning of the seventeenth century, by James I. It is not, therefore, surprising that the Council of the Norman and Angevin kings should also have been the *Curia Regis*, where the king or his delegate, the grand justiciary, sat for the determination of such causes as concerned the State or transcended the powers of the county courts.<sup>7</sup>

<sup>1</sup> 2 Parliamentary History, 322.

<sup>2</sup> 1 Stubbs' Constitutional History of England, 598.

<sup>3</sup> 1 Stubbs' Constitutional History of England, 387, notes.

<sup>4</sup> 12 Coke, 63.

<sup>5</sup> Mignet, La Féodalité, partie 2, ch. v. p. 121.

<sup>6</sup> See Faure, Histoire de St. Louis, vol. ii. livre viii. c. 12, p. 340.

<sup>7</sup> The power which renders judgment should obviously be one strong enough to execute what it decrees. In France the administration of justice consequently fell in the first instance to the barons, who presided personally or through their bailiffs in their respective feuds, and as the

The course of events was so far the same in France that the higher courts, including a tribunal which still bore the name of "Parliament," the *Chambre des Comptes*, answering to the English Exchequer, the King's Privy Council, and even the *États Généraux*, may be traced to the *Cour du Roi*, which was the analogue of the *Curia Regis*, *Commune Consilium*, or Great Council.

Long after the transformation of the Parliament of Paris into a court sitting constantly for the administration of justice, it still claimed the political power which it had exercised while it was attended by the tenants *in capite* and peers of France, and the jurists held a subordinate position. For as a usage dating from that remote period rendered it essential that the royal ordinances should be enrolled or registered by the Parliament, so it might be plausibly contended that the presidents and councillors should not by that form lend their sanction to an unjust or mischievous law.<sup>1</sup> They were from their point of view an areopagus or senate, and as such entitled to oppose the arbitrary measures prompted by ministers or favorites, and be a useful check on the profusion of the Crown.<sup>2</sup> This pretension was more or less successfully

royal authority increased was arrogated by the Crown (Faure, *Histoire de St. Louis*, livre viii. ch. xii. p. 546). So the effect of the Norman conquest was to oust the jurisdiction of the English county courts and substitute the *Curia Regis*. The executive, the legislative, and the judicial power were thus lodged in the same hand, subject to the restraints imposed by the feudal organization; but the tendency to absolutism was checked in both countries by two causes, — one, the increasing complexity of the laws, which made study and experience essential to the judicial function; the other, that the sovereign's time was ordinarily so much engrossed by the chase, pleasure, or the affairs of State as to compel him to intrust the hearing of causes to delegates, who gradually acquired a consideration and influence that rendered them, to some extent, independent of the throne.

It was, however, by slow degrees, and not until after the lapse of centuries, that the judiciary came to be regarded as a distinct and co-ordinate branch of the government, not less important than the executive or legislative, and which should be so placed as to administer even-handed justice, regardless of royal favor or popular caprice. (See *ante*, p. 136.)

<sup>1</sup> Thierry, *History of the Tiers Etat*, vol. i. ch. viii. pp. 256, 260.

<sup>2</sup> Thierry, *History of the Tiers Etat*, vol. i. chap. viii. p. 237.

asserted as late as the seventeenth century and during the anarchy of the Fronde, but fell before the command of Louis XIV., who, then scarce seventeen, in hunting costume and whip in hand, forbade opposition or delay.<sup>1</sup>

The Parliament continued to exercise a restraining, though intermittent, influence, — which was the more real because the judges were on the whole capable and honest, and could not be removed without refunding the money which they had paid on entering into office, — and its political significance was conspicuously apparent when it virtually set aside the will of Louis XIV. and annulled the restrictions which he had laid on the regency of the Duke of Orleans, who in return declared that he restored their ancient privilege of remonstrance.<sup>2</sup> It is only by thus tracing the stream of history to its source that we can understand why great French nobles should on this and other occasions have taken their places in a body which had long been simply a court of justice, or why the chancellor presides in the English House of Lords, or whence that assembly derives the right to summon the judges and require their opinions, or to sit without them, although principally composed of laymen, as the tribunal of last resort for the determination of technical and recondite legal questions.<sup>3</sup>

<sup>1</sup> St. Aulaire, *Histoire de la Fronde*, vol. ii. ch. xix. p. 319; Voltaire, *Histoire du Parlement de Paris*, vol. ii. ch. lvii. p. 265.

<sup>2</sup> *Mémoires de Saint-Simon*, vol. xiii. ch. xiv.; Thierry, *History of the Tiers Etat*, vol. i. ch. viii. p. 257.

<sup>3</sup> "The *Cour Royale*, therefore, lost its unity. It was differently composed according as it sat as a judicial or as a political body, according as it heard and determined suits or enacted laws. This division was an inevitable consequence of the course pursued by St. Louis. It was not less inevitable that the new organization should pass from the domain of legislation to that of law; and thirty-two years after the death of St. Louis the composition of the *Cour Royale* and the influence of the civilians had produced a fixed and permanent judicial body retaining only the name of Parliament; a court or chamber of nobles for matters of finance; a privy council which the king called at his pleasure, which advised him, but did not control his will; and finally the States-General." Faure, *Histoire de St. Louis*, vol. ii. livre viii. ch. xi. p. 338.

If systems which were originally analogous diverged with a less force.

The severance of the courts and their organization as distinct tribunals tended in England to augment rather than abrogate the power of the Crown, by rendering the Privy Council an extraordinary court for the redress of such wrongs as were beyond the reach of the ordinary tribunals. The Privy Council thus became a formidable instrument of arbitrary power, which subsisted in the form of the Star Chamber until abolished by the Long Parliament; and the Judicial Committee of the Privy Council springs from the same root, though used for very different purposes. In the words of Mr. Green, "the king in council wielded a power which was not only judicial, but executive. His decisions, though based upon custom, were not fettered by it, and it was as his will that they were carried out by the officers of the Crown."<sup>1</sup>

It would nevertheless be erroneous to infer that the English courts were in the worst times mere dependencies of the Crown, and could be implicitly relied on as instruments of arbitrary power. The English Constitution can hardly be said to have existed before the reign of Edward I.; but from that time onward it was understood that the justices, though acting in the king's name, exercised an unbiassed judgment, and were personally responsible for their conduct while in office; and the occasional attempts on the king's part to arrogate or control the judicial function were condemned by the public voice and in Parliament, and generally withstood by the courts.<sup>2</sup>

"When," says Lord Coke in the Second Institute, "any judicial act is by any act of Parliament referred to the king, it is understood to be done in some court of justice, according

tunate result in France, the reason is that while the Saxon, the Dane, and the Norman were not only from the same stock, but cousins-german, and readily coalesced to form the English people, the Gauls belonged to the Celtic branch of the great Aryan stock, and having been fashioned to the Roman yoke, were slow to adopt the free institutions which were the birth-right of the Franks as of the other Germanic tribes.

<sup>1</sup> 1 Green's History of the English People, 326; see Faure for an analogous account of the jurisdiction exercised by St. Louis, vol. ii. livre viii. p. 344.

<sup>2</sup> 12 Coke, 63; Campbell's Lives of the Chief-Justices, 271.

to the law. And the opinion of Gascoigne is notable in this point, that the king has committed all his power judicial to divers courts, some in one court, some in another.”<sup>1</sup> The separation of the judicial function from the executive was, however, effected by slow degrees, and not without much reluctance on the part of the Crown, and can hardly be said to have been definitively accomplished before the close of the seventeenth century. As late as the reign of James I. it was still possible for an Archbishop of Canterbury to advise the monarch that he might personally adjudge spiritual causes, and, as it would seem, all others. He was the source of justice, the courts sat by an authority derived from him, and what they did as his delegates he might do himself. James was not slow to act on a suggestion which flattered his vanity as a pedant not less than his love of arbitrary rule. The judges were summoned to the royal closet and indoctrinated by the king. Coke, who spoke for his brethren, relied, *inter alia*, on an utterance of Chief-Justice Markham, in the reign of Edward IV., as showing that the king, being irresponsible, must act through others, and could not arrest a man for suspicion of treason or felony, as his lieges might, because the party could have no remedy against the king. By the law of England the king, in his own person, could not adjudge any case, criminal or civil, betwixt party and party, concerning an inheritance or goods, but these matters ought to be determined in some court of justice. The form of giving judgment, *ideo consideratum est per curiam*, showed that it was the court which gave the judgment. Richard III. and Henry VII. sat in the Star Chamber; but that was to consult with the judges upon certain questions proposed to them, and not *in judicio*. So in the King’s Bench he might sit, but it is the court which determines. It appeared from a roll of Parliament in the Tower of London, 17 Richard II., that a controversy of land having been heard by the king, and sentence given, it was reversed for this, that the matter belonged to the common law. The king’s rejoinder, that he

<sup>1</sup> 2 Institutes, 186.

had always heard that the law was the perfection of reason, and if so he had reason as well as his judges, was met by the reply that questions concerning the lives or goods of his subjects were "not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an act which requires long study and experience." "Am I then," said James, "to be under the law?" To which Coke answered, "Bracton saith, *quod rex non debet esse sub homine, sed sub Deo et lege.*"<sup>1</sup>

In reading this account we should remember that the lion was the painter, since it was penned by Coke; but there can be little doubt that James met with a severe and well-merited repulse. Instead of profiting by the lesson, he would seem to have resolved that where the prerogative was, however remotely drawn in question, he would dictate the decision if he could not sit as the judge. Accordingly, some years afterwards the Attorney-General, Sir Francis Bacon, by the king's command addressed a written request, or rather an order, to the King's Bench not to proceed to judgment in a cause involving the right of ecclesiastical preferment "until his majesty's further pleasure should be known upon consulting him." The court met this injurious mandate by at once entering the judgment on which it had already resolved; and the judges then wrote a firm, though respectful, letter to the sovereign, declaring that they could not have done otherwise consistently with their oaths. The reply was a summons to appear before the king, who in the presence and with the concurrence of his obsequious Attorney-General and Lord Chancellor Ellsmere, rated them soundly, not only for their disobedience to his orders, but for their presumption in sending such an excuse. The twelve prayed for pardon on their knees; and were then interrogated whether when the king believed either his prerogative or interest to be concerned, and required the attendance of the judges, "they ought not to stay proceedings until his majesty had consulted with them." All assented, except Coke, who made what Lord

<sup>1</sup> 12 Reports, 63.

Campbell justly calls the simple and sublime answer, "when the case happens, I shall do that which shall be fit for a judge to do." Such a manly temper was intolerable in that age, and Coke soon afterwards was removed from his place.<sup>1</sup>

James died in 1625; and his successor, who inherited his father's tendency to absolutism, sought at the very outset of his reign to prepare the way for the suppression of the liberties of the subject by inducing the then Chief-Justice Crewe to declare privately in favor of the right to raise money without the consent of Parliament, and to imprison without cause assigned. The response was worthy of an English judge; and Crewe was forthwith displaced, to make room for the appointment of Nicolas Hyde, whose character and antecedents were such as to render it most unlikely that he would resist any demand of the court, — an expectation fully justified by his course on the Bench.

I may not pursue the subject farther, but these instances are enough to show how great a pressure was then brought to bear on the judicial office; and it is not surprising that men who, like Hyde, were selected for their complaisance, should have yielded to the solicitations of the court. It would be unfair to argue from such cases to a general rule, and a considerate examination will, on the contrary, show that if in the long roll of English judges anterior to the Revolution of 1688 some may justly be reproached as servile, there were others who rated their honor and the science of the law above court favor and the sweets of office. Among these may be enumerated Fortescue and Markham, — one Lancastrian, and the other Yorkist, but who held the scales even between either faction; Gascoigne, immortalized by Shakspeare as the chief-justice who committed the Prince; the eloquent

<sup>1</sup> Bacon, with characteristic meanness and sagacity, proposed to attain the end which James had in view by so using the writ *de non procedendo rege inconsulto* as to bring "any cause that may concern your majesty in profit or power from the ordinary benches to be tried and judged by the chancellor of England. And your majesty knoweth your chancellor is ever a powerful counsellor and instrument of monarchy of immediate dependence on the king, and therefore like to a safe and tender guardian of regal rights."

Crewe, removed because he would not pledge himself to support the illegal measures of Charles I.; and finally, Sir Edward Coke, whose dismissal from the King's Bench gave an opportunity for serving the cause of liberty still more effectually in Parliament. One explanation of a more favorable result than could have been anticipated under such circumstances is 'that the fear of the king's displeasure was balanced by the dread of an impeachment; but a more powerful cause seems to have been the temper of the common lawyers, who, unlike the Continental jurists, were as a body on the side of freedom, and ready to visit with the severest condemnation any judgment that contravened rules and precedents which they revered as sacred.<sup>1</sup> They felt instinctively that to outlive liberty would be to outlive the law; their learning furnished the precedents on which to build the Petition of Right; their doctrines were a constant, if not always an effectual, check on ministers like Laud and Strafford; and it was finally the forms of the common law that secured an impartial jury and foiled the attempt to crush the Church of England in the persons of its bishops. It was not, however, until the deposition of James II. that the judiciary acquired the certainty of tenure which is essential to its dignity and usefulness, and became in fact as in popular estimation a co-ordinate branch of the government, standing nearly if not quite on a level with the legislature and the executive.

<sup>1</sup> Hallam's Constitutional History, vol. ii. ch. viii. p. 52.

## LECTURE X.

The English Constitution (*continued*). — Modern Ascendency of the House of Commons. — It practically appoints the Ministry. — Parliamentary Government through a Ministry dependent on a Majority in the House of Commons, contrasted with the Independent Exercise of Executive Powers by the President of the United States. — Causes which produced the English System.

IF the English government as originally constituted was limited in its several parts, it was and still is absolute as a whole, or restrained only by public opinion and the fear of provoking popular resistance. De Lolme relates that the English lawyers were wont to say that Parliament might do anything but renew the classic fable by making a man a woman, or a woman a man. There is no change in the established order of things, no suppression of chartered or prescriptive right, that would not, if declared by Parliament, be legally binding on the English people.<sup>1</sup> Magna Charta, though in form a grant from the Crown, is in effect a statute, which with the statutes by which it was confirmed might be legislatively repealed; and this is equally true of the Petition of Right and the other great landmarks of English liberty. Nor does the power of Parliament stop here. The judges might, if it so willed, be dismissed to make way for others who would be more subservient to the passions of the hour as represented in the House of Commons. Representation might be denied to Wales or Yorkshire, a deed or will annulled, or land taken from the owner and given to a stranger. If a new faith were set up by Parliament, as it was in the time of Henry VIII., no lawyer would allege that the act was void.

<sup>1</sup> 2 Institutes, 525.

In this brief outline of the English Constitution as it stands in the pages of Blackstone we see a government absolute as a whole, but composed of three several branches, each performing an appropriate part and constituting an effectual check on the others. A nearer view will nevertheless disclose a singular difference between the theory and practice. In the absence of legal or fixed boundaries there are yet certain ideal lines within which Parliament is in fact confined, and which cannot be transgressed without outraging public opinion and producing a deep-seated discontent that would lead to revolution. It is in an unwritten code, in maxims handed down traditionally, in principles which have stood the test of experience, that we must seek the strength, the equipoise, and the stability of the English government. It is well for English freedom that it should be so, because the equal distribution of power existing at an earlier period has been singularly disturbed in modern times by the ascendancy of the House of Commons. In the sixteenth century not only the foreign policy, but the internal administration of the kingdom, was exclusively under the dominion of the Crown. Parliament might, and to a certain extent did, legislate in matters that did not trench on the royal prerogative; but when the question was in what way and through whom the law should be carried into execution, sedition repressed, or the country protected against foreign aggression, the Tudors, and even the feeble James I., were intolerant of the voice of Parliament. I need not remind you how large a share the passions, the enmities, the private feelings and convictions of Henry VIII. and Queen Elizabeth had in the course of the English Reformation; and the servants of those sovereigns were, as history shows, chosen with but little deference for the opinion of the House of Commons. When a minister fell, it might be important to have friends and supporters in Parliament; in the mean time the favor of his master was a sufficient safeguard. While such men as Wolsey, Cromwell, Burleigh, Walsingham, or Bacon were placed near the helm, this was hardly a test of the power of the Crown; their abilities would have been distinguished under any form of govern-

ment: but the omnipotence of the arrogant and ostentatious Buckingham under Charles I., and the fruitless efforts of successive Parliaments to bring him to justice, are a convincing proof that the Constitution did not yet afford a safeguard against the influence of an unworthy favorite.<sup>1</sup>

The English government was then in fact what it is still sometimes called, a limited monarchy; the king being the motive and guiding power, and Parliament a check or restraint that kept the royal prerogative in bounds and prevented it from encroaching too far on individual right. If Charles had been an abler man, or less arbitrary as a king, the change from the old to the new order of things might have been indefinitely postponed, or have turned in favor of the prerogative. But when the resentments which the despotic rule of Strafford had inflamed culminated in a bill of attainder, the king was wanting to a servant who had been thorough to his master, and the House of Commons obtained in the conviction and death of the minister an ascendancy that has not since been successfully disputed by the Crown. The Restoration was, it is true, followed by an interregnum, during which either principle might seem to be on the eve of gaining the upper hand; but when the conflict between the king and Parliament was pushed to an issue by James II., the monarchy was again worsted in the struggle, and ceased to be a controlling element in the English government. His own abilities and the critical state of the times gave William III. a predominance which no sovereign of England has since enjoyed, but the accession of the Hanoverian line inaugurated the aristocratic commonwealth that has since, with an increasing measure of popular influence, borne sway in England. It is true that George III. had during the greater part of his reign no inconsiderable share of the authority which is commonly ascribed to monarchs; but with this exception, the power of the Crown has during the last hundred and eighty years been exercised by an executive council chosen by the House of Commons. Though bearing

<sup>1</sup> 2 Parliamentary History, 404, 419.

the title of the ministers of the king, they are in fact neither selected by nor responsible to him. Like the hand on the dial, he merely indicates a result which the previous course of events has made inevitable. To use a phrase which was constantly in the mouths of the opposition under Louis Philippe, in a constitutional government formed on the English model the monarch presides or reigns, but does not govern. The place filled by the President in our system is accordingly held in England, not by the King, but by the Prime Minister, or rather by the cabinet taken collectively and acting as a whole. This constitutes a material difference in the working of the two systems, at a point where they might at first sight seem much the same. Theoretically, the executive power is vested in both countries in a chief magistrate whose tenure is independent of the legislature; practically, the ministry are designated by the majority of the House of Commons, and may be displaced by a vote of want of confidence. If the American Constitution were what the English has virtually become, the conduct of public affairs would devolve, not on a President holding his office for a definite term, whom Congress does not select and cannot remove, but on the party leader who for the time being predominated in Congress. To Thaddeus Stevens, and not to Mr. Johnson, would confessedly have belonged the question whether the South should be reconstructed through martial law, and we should have avoided the conflict of authority which more than once seemed to be on the eve of assuming such formidable proportions. Whether such a subordination of the executive power to the legislature would be beneficial here, I need not now inquire. It certainly was not the method of government contemplated by the framers of the Constitution.

Some of the results of this difference between the English government and our own are interesting and instructive. I will advert to one of them. The king of England, according to the theory of the Constitution, is entitled to form alliances, to declare war, and to bring it to a conclusion by a treaty of peace. In point of fact these powers are exercised by his

ministers, who are in their turn, as I have already stated, designated by the House of Commons. If that body disapproves of the foreign policy of the government, if it is of opinion that the honor of the country is sacrificed on the one hand to a desire for peace, or on the other that hostilities are uselessly prolonged, it may compel the existing ministry to resign, and fill their places with men who are pledged to a different course. It is true that when a minister withdraws, the power of appointing his successor is with the king; but as he must take the leader of the opposition, or some one whom the opposition will support, the choice is really made by Parliament.

Such a method places the men who stand at the helm of State under the control of the assembly which represents the nation, and compels them to shape their course according to its pleasure. If the will of the prime minister prevails, it is not because it is his will, but because he is able to convince a majority of his colleagues and of the House of Commons. It is the reverse of personal government, and has therefore been aptly designated as parliamentary. Our system, on the contrary, intrusts the executive department of the government to a chief magistrate, who during his term of office, and so far as his power extends, is virtually a king. Instead of a prime minister, designated by the legislature and dependent on their votes for his continuance in office, we have a President chosen for four years, who can be removed only by an impeachment and conviction for treason, corruption, or other high crime or misdemeanor. He is as much the representative of the entire people of the United States as any member of Congress can be of his district, and should therefore exercise the discretionary powers confided to him by the Constitution in the way that he may deem best calculated to promote the welfare of the country, which may not be the way deemed best by Congress. Take, for instance, the case of a war which Congress thinks unnecessary or unjust, and wishes to close on terms that the enemy are willing to accept. Still, it is the right of the President, and not of Congress, to determine whether the terms are advantageous, and if he

refuses to make peace, the war must go on. Under such circumstances it would clearly be the duty of Parliament to withhold the supplies necessary for carrying on the war, because such a vote on their part would produce a change of ministry, followed by the return of peace; but as a corresponding action on the part of Congress will not lead to a cessation of hostilities, it is as clearly their duty to provide the means for prosecuting the contest with effect and bringing it to an honorable termination.

Accordingly, when President Polk precipitated hostilities with Mexico by marching an army into the disputed territory, Congress had no choice but to declare the existence of the war which he had provoked and which they had no power to terminate. So the question, whether the South should be relieved from military occupation and regain the political freedom which the Constitution guarantees, was recently determined by the executive, and not by the legislature, which could neither command the withdrawal of the troops nor direct that they should remain.<sup>1</sup>

Other instances may be imagined where the policy of the President may diverge from that preferred by Congress, and where it may, notwithstanding, be incumbent on Congress to attend upon and further the course of the executive. This was more than once the case during the administration of Washington, whose sage policy kept the immature strength of the Republic from being involved in the war of giants that was then raging in Europe.

That such divergences of the executive and legislature are full of danger, is shown by the unhappy differences which

<sup>1</sup> It may be asked, Should Congress aid in carrying on an unnecessary war? The answer is, that there are limits to human responsibility; and as the power of instituting negotiations is vested exclusively in the executive, the House of Representatives ought not to do by indirect means what it cannot do directly, or compel the President to make peace contrary to what may be his better judgment, by refusing the supplies requisite for the armies in the field, and leaving the country open to the incursions of the enemy. The case of a purely offensive war, waged for the subjugation of a country so weak or distant as to have no means of retaliation, might no doubt be an exception.

occurred during the presidential term of Mr. Johnson; and they are all the more likely to arise, because the party which prevails in Congress is not infrequently in direct and violent opposition to that by which the chief magistrate was elevated to office. Instead of the mutual confidence that must exist under the English system between the department of the government which enacts and that which executes the law, there may be jealousies and heart-burnings, followed by a resort to undue means to bend the executive to the will of the legislature, or place the legislature under the feet of the executive. In such a struggle the popular assembly will generally, in the long run, prevail; and some of those who hear me may live to see the House of Representatives approach more nearly than it does at present to the position of the House of Commons. Such a result would be contrary to the theory of the Constitution, but may be forced on us by circumstances.

A chief magistrate who wields the whole military and no inconsiderable share of the civil power of the State, who can incline the scale to war and forbid the return of peace, whose veto will stay the course of legislation, who is the source of the enormous patronage which is the main lever in the politics of the United States, exercises functions which are more truly regal than those of an English monarch. Once chosen, he is irremovable for four years by anything short of an impeachment by the House and a condemnation by a two thirds vote of the Senate, and may mould the policy of the government, as did Jackson, with no great regard for the opinion of Congress. In a critical conjuncture his influence for good or evil may be enormous, and can be estimated by supposing that secession had occurred at the commencement of Mr. Buchanan's term of office, and that he had insisted on negotiating, instead of meeting force with force. Elect such a magistrate for life, or give him a permanent hold on office, and he may be termed Mr. President, but will be every inch a king.

This doctrine may sound strange in the ears of some, who more or less unconsciously derive their conception of the exe-

cutive function from the English Constitution as it now is, and not as it existed during the last century. Their tendency is to regard the President not as a distinct and co-ordinate branch of the government, but as the mouthpiece of the legislature and a more or less pliant instrument in its hands. Such was not the design of the members of the Federal Convention, whose object, like that of the founders of the Roman commonwealth, was not so much to abridge the kingly power, which they regarded as essential, within proper limits, to the public safety, as to render it compatible with freedom and the theory of republican government by intrusting it to an officer chosen for a limited period, who would act as the delegate or representative of the people.<sup>1</sup> They regarded the independence of the executive as hardly less important than that of the legislature and the judiciary, and meant that each department should be a check on the others.<sup>2</sup>

Jefferson no doubt erred grossly in calling the President a bad edition of a Polish king ; but his language is an exaggeration or perversion, rather than a falsification of the truth. No one can read the judicial decisions which treat of the chief magistrate without seeing that he may exercise a large discretion even in peace ; and his authority as commander-in-chief during war and insurrection is, agreeably to the same judgments and the practice of Mr. Lincoln's cabinet, as indefinite and arbitrary as that exercised by the Roman consuls when instructed to take care that the Republic should not suffer harm. It is accordingly clear that the power of stopping the supplies, which, though kept in the background, is the *ultima ratio* of the House of Commons, and renders it virtually supreme, cannot rightfully be employed here to control the executive department of the government, unless it is transgressing the limits of the Constitution or entering on some course

<sup>1</sup> Mommsen, History of Rome, vol. i. book ii. ch. i. p. 323 (New York) ; The Federalist, No. 39, by Madison ; History, etc., by John C. Hamilton, iii. 340, 342 ; The Federalist, Nos. 70 and 71 ; Story on the Constitution, sections 1,417, 1,418, 1,427, 1,431, 1,432.

<sup>2</sup> Curtis's History of the Constitution, vol. ii. chaps. iii., viii. pp. 57, 172, 173, 247.

contrary to law. If this was at all doubtful originally, it was established by the strenuous and unsuccessful efforts of the majority of the House of Representatives to shape the administration of Mr. Hayes.

It is not surprising that an election of so much moment, and on which so many selfish as well as public interests depend, should evoke burning passions and give occasion for the fraud, violence, and intrigue which were unhappily so rife in the year which as the Hundredth Anniversary of our Independence, should have been free from such a taint; and it has become a question with reflecting minds whether the Republic can bear the stress to which it is periodically subjected, or hope for another hundred years of life, unless some change is made in the executive department that will render the choice of a President less momentous than it is at present.<sup>1</sup>

A ready way of accomplishing such a reform is to curtail the President's patronage, by making fitness as ascertained by a preliminary examination the path to office, in lieu of the favoritism that now prevails, and putting some check on the power of arbitrary removal, which makes the servants of the American people moral serfs. But it has been contended that we should also substitute parliamentary government for personal, by rendering the cabinet responsible to Congress, and

<sup>1</sup> Hamilton's memoranda of the debates of the Federal Convention contain this observation: "At the period which terminates the existence of the executive there will always be an awful crisis in the national situation;" and he is said to have remarked in conversation with a friend: the time will "assuredly come when every vital question of the State will be merged in the question, 'Who shall be the next President?'" History, etc., by John C. Hamilton, iii. 335, 346. And it was the wish to lessen this danger that led him finally to consider a "moderate term of years" as preferable to a longer period, or the tenure during good behavior which he had originally advocated. It is greatly to the credit of the American people that successive Presidents should have been elected, during a period of more than eighty years, with a regard for constitutional forms that has few examples in history; and if the events of 1876 tended to justify Hamilton's sombre forebodings, it was in consequence of the anomalous condition of the Southern States and the grant of universal suffrage to the colored race under circumstances that were not fitted for its exercise.\*

removable, as in England, on a vote of want of confidence. Such is the rule in France, where the ministers are nominated by the President, but depend on the votes of the Lower House, and must resign if that is adverse. It is significant that the framers of the organic laws of the French Republic should, after a century's experience of the working of the English method and our own, have preferred the former, as bringing the executive within the control of the legislature; but time alone can disclose whether their course was wise.

The contrast between the relations of the executive to the legislature, as they exist in England and in the United States, and the disadvantages of the method adopted here, are clearly portrayed in Story's Commentaries on the Constitution. He ascribes the evil to the last clause of the sixth section of the first article, — "that no person holding any office under the United States shall be a member of either House during his continuance in office;" but it would seem to be a necessary incident to a Constitution under which the President is neither chosen by nor ordinarily accountable to Congress.

"The universal exclusion," says Story,<sup>1</sup> "of all persons holding office from Congress is, it must be admitted, attended with some inconveniences. The heads of the departments are in fact thus precluded from proposing or vindicating their own measures in the face of the nation in the course of debate, and compelled to submit them to other men, who are either imperfectly acquainted with the measures, or are indifferent to their success or failure. Thus that open and public responsibility for measures which properly belongs to the executive in all governments, and especially in a republican government, as its greatest security and strength, is completely done away. The executive is compelled to resort to interviews and private arrangements to accomplish its own appropriate purposes, instead of proposing and sustaining its own duties and measures by a bold and manly appeal to the nation in the face of its representatives. One consequence of this state of things is, that there never can be traced home to the execu-

<sup>1</sup> Commentaries on the Constitution, sections 869, 870.

tive any responsibility for the measures which are planned and carried out at its suggestion. Another consequence will be (if it has not yet been), that measures will be adopted or defeated by private intrigues, political combinations, irresponsible recommendations, and all the blandishments of office and all the deadening weight of silent patronage. The executive will never be compelled to avow or to support any opinions. Its ministers may conceal or evade any expression of their opinions. It will seem to follow, when in fact it directs, the opinions of Congress. It will assume the air of a dependent instrument ready to adopt the acts of the legislature, when in fact its spirit and its wishes pervade the whole system of legislation. If corruption ever eats its way silently into the vitals of this Republic, it will be because the people are unable to bring responsibility home to the executive through his chosen ministers. They will be betrayed when their suspicions are most lulled by the executive, under the disguise of an obedience to the will of Congress. If it would not have been safe to trust the heads of departments, as representatives, to the choice of the people as their constituents, it would have been at least some gain to have allowed them a seat, like territorial delegates, in the House of Representatives, where they might freely debate without a title to vote. In such an event their influence, whatever it would be, would be seen and felt and understood, and on that account would have involved little danger and more searching jealousy and opposition; whereas it is now secret and silent, and from that very cause may become overwhelming.

“Another reason in favor of such a right is, that it would compel the executive to make appointments for the high departments of government, not from personal or party favoritism, but from statesmen of high public character, talents, experience, and elevated services, from statesmen who had earned public favor and could command public confidence. At present, gross incapacity may be concealed under official forms, and ignorance silently escape by shifting the labors upon more intelligent subordinates in office. The nation would be, on the other plan, better served, and the execu-

tive sustained by more masculine eloquence as well as more liberal learning.”

Cogent as is this argument, there are counterbalancing considerations of equal force. Notwithstanding the many advantages of parliamentary government, we may doubt whether it is practicable save under conditions that can best be delineated by referring to the example of England, where alone they have been adequately fulfilled.<sup>1</sup> We there behold a sovereign,—who, while giving dignity and continuity to the State, leaves the conduct of public affairs to ministers whom he does not choose,—and an assembly which was wise and moderate enough to govern in his name without depriving him of the show of power, or rendering him a puppet that can have no hold on the affections of the people. The House of Commons, though chosen by a popular vote and in sympathy with the nation, was long so far the representative of the well-born, educated, and wealthy classes as to be superior to the passions of the hour and able to consider burning questions in the light of principles and precedents that were handed down traditionally, and religiously observed. It had also a tone or *esprit de corps* which forbade factious combination for the sake of power, and obstruction used systematically as a means of hindering the transaction of public business and preventing the majority from arriving at a vote. The entire system centred in the majority of the House of Commons, which might be changed by a few voices, but was yet ordinarily not so unstable as to preclude a firm and consistent policy or render the tenure of office so insecure that ministers could not carry out any one design.

Such was England; but can it be so described at the present day? A group of men acting with the professed design of blocking every beneficial measure and rendering government impracticable, virtually controls the Commons, and by coalescing in turn with each of the great parties which divide Parliament is able to change the ministry at pleasure. The Marquis of Salisbury was thus put in the place of Mr. Gladstone, and then in less than six months summarily ejected

<sup>1</sup> Gneist, *The English Parliament*, p. 314, Boston, 1886.

amid derisive shouts of "boycotted," and Gladstone reinstated; and it is not surprising that the latter should, in view of his fall, have shifted the helm and resolved to put an end to a situation which was unendurable, by giving Ireland the home rule which would restore autonomy to England. The experiment found favor in Scotland and in Wales, and was accepted by a numerous class in Ireland as an instalment of a long unpaid debt, but was decisively rejected by England at the polls; and another turn of the kaleidoscope brought back Salisbury, while leaving Parnell and "Obstruction" master of the situation.

Parliamentary government is not more successful in France, where the Chamber is broken into discordant groups, and Monarchists and Jacobins unite to block the path of the men who favor a moderate republic, though no policy which either extreme can propose will be supported by the other. The result is a constant change of ministry, which weakens the hold of the republic on the popular heart, and may lead to a restoration of the monarchy, or enable some successful general to found an empire that will end as disastrously as its predecessors.

No such instability can well occur in the United States, where if a third party rendered ordinary legislation impracticable, with the view of obtaining some real or fancied benefit for a particular State or section, it would still be possible to vote the supplies; and the government would proceed in its accustomed course under the guidance of the President, notwithstanding the discord which prevailed in Congress.

There is another view which must not be lost sight of in considering how far parliamentary government is applicable in a republic. The chief magistrate is, under such a system, chief only in name, and is the gilded figure-head of the ship of State rather than the pilot who stands at the helm. He has neither the authority of a premier nor the dignity of a king, but must accept the ministers who are assigned to him by the popular branch of the legislature, and follow the policy which they dictate, contrary as it may be to his own judgment and calculated to exhaust the finances or lead the

country into a disastrous war. The situation is the more difficult because he cannot proclaim his dissent, and may be held answerable by public opinion, and even at the bar of history, for follies which he did not share and aggressions of which he disapproved. No strong man can well desire to fill an office where commanding abilities would be as much out of place as on the English throne ; and yet strength might be needed in an extreme crisis which rendered it necessary for the chief magistrate to supersede an incapable or vacillating minister and dictate the measures that were requisite for the public safety. Here again we may note the advantage of our system, which renders the executive independent of the legislature so long as he keeps within the limits of the Constitution, and gives the nation a chief magistrate chosen by the people and able to pursue a steadfast course during the four years of his office.

The question is one of the utmost gravity in England, where parliamentary government is the only method of reconciling popular rights with monarchy, and its failure would lead to the downfall of the Crown. Such a lapse of a Constitution that has contributed more than any other to the advance of political and personal freedom, would be viewed by every considerate observer with regret ; and should a democratic republic follow, the popular will might not be as justly or moderately expressed as it is under the Constitution of the United States.<sup>1</sup>

It is a necessary consequence of the independence of the executive that while the composition of an English ministry depends on Parliament, the President is confessedly entitled to select his cabinet ; and any attempt on the part of Congress to narrow his choice or prevent him from exercising an unbiassed judgment would be generally regarded as a usurpation, and subversive of the balance which it was a main object of the framers of the Constitution to establish. The Senate may and ought to withhold their assent when the appointee is legally disqualified or incompetent ; but could not by a systematic rejection compel the President to take a Secretary of

<sup>1</sup> Gneist, *The English Parliament*, pp. 315, 316.

State or of the Treasury from a different or hostile party because it was dominant in Congress, without using their power to an end foreign to that for which it was conferred. We have accordingly seen a Republican cabinet co-exist with a Democratic majority in the House of Representatives during Mr. Hayes's term of office; and an instance of a like kind occurred under the presidency of John Adams. It can indeed serve no good purpose to force a cabinet on the President, because the policy of the Constitution is that he shall directly or through his subordinates have the entire charge of the duties of his office, and neither lessen his responsibility by sharing it with a council, or be in any wise controlled by them.<sup>1</sup> He is and must remain personally answerable; and it would therefore be eminently unjust to require him to consult his cabinet and be guided by their advice, especially if they were virtually chosen by others and not the result of his deliberate choice. It is the reverse of the English system, which has for its fundamental maxim that the king can do no wrong, and that every step in his official life is taken at the suggestion or the counsel of some adviser who can be held to a strict account.

It may be doubted, in view of this and some other features of the Constitution, whether the members of the Convention which framed our government knew how rapidly the House of Commons was engrossing all the powers of the State. There were few even among the students of constitutional history who perceived what the studied phrases of Blackstone tended to conceal, — that the dream of Vane and Sidney had taken shape and substance in a commonwealth recalling the grandeur and far-reaching power of Rome.<sup>2</sup> Men still viewed the royal prerogative with apprehension, and the aggression on the freedom of the Colonies had been popularly regarded as proceeding from the Crown. There was the more reason for such a belief because George III. had, on mounting the throne, displayed a vigor and decision which might, if joined to a sound and penetrating judgment, and the abilities that

<sup>1</sup> Story's Commentaries on the Constitution, sect. 1427.

<sup>2</sup> Gneist, *The English Parliament*, pp. 315, 316 (trans.; Boston, 1886).

command popular respect and admiration, have changed the course of events on both sides of the Atlantic. The Revolution of 1688 did not so much prove the firmness of the English people, or their steadfastness in maintaining their freedom, as the incapacity of James II. Among the minor causes that have led to great events may be enumerated the marriage of Mary Queen of Scots to Darnley. It was from him that the monarchs of the house of Stuart inherited the waywardness, the weakness, the instability that placed them in such marked contrast to their predecessors, and at once provoked and encouraged the resistance which, in establishing the liberty of England, contributed so largely to our own. There are periods in the history of races when everything may turn on the greatness of an individual, as there are others when the current of events is too strong to be controlled. If James II. had possessed the force of character and military talent of Gustavus Adolphus, or even of his gallant descendant in the second generation, Charles Edward, the cause of popular liberty would have been seriously imperilled. After the defeat at the Boyne and the surrender of Limerick, the last city that held out for the Stuarts, one of their most devoted adherents declared his readiness to renew the conflict if the other side would change kings. It might, as late as the succeeding century, have been possible for a wise and able prince, possessing the popular qualities of Cæsar or Henry IV., to put the liberties of the nation beneath the Crown, — such, at least, is the opinion of a great critic and historian, Mr. Grote. But this is one of those chapters which Destiny leaves unwritten for want of a fitting instrument.

In the selfish acquiescence of Queen Anne and the honest mediocrity, broken by occasional lapses into vice, of the Hanoverian line, there was nothing that could imperil parliamentary government, and much to foster and advance its growth. During the earlier part of the reign of George III. there was, indeed, a reflux that promised to restore no small portion of the authority which the Crown had lost.

The spirit of loyalty had languished for seventy years

in England for want of its appropriate aliment. Though James II. had deeply wounded the High-Church divines and the landed gentry, they still regarded his deposition and the exclusion of his descendants as a sacrilegious spoliation. William III. was in their eyes a military usurper, Queen Anne the unnatural occupant of a brother's throne, and George I. and George II. alien intruders who kept the rightful heir from his inheritance. The Legitimatisers, by a strange sport of fortune, became antagonistic to the actual wearers of the crown, and caught up or echoed the cry of patriotism until they came to regard it as their own.<sup>1</sup> A country party was thus formed, which from love for monarchy opposed the court, and favored a more liberal rule than that of the great Whig families, which had originally espoused the cause of the Hanoverian line from a sincere attachment to constitutional freedom. The Stuarts, who had never been thoroughly anglicized, became still more estranged by their long residence on the Continent; while the Guelphs took root in their adopted country, and at length produced a scion that might fairly be considered as of English growth. The death of Frederick, Prince of Wales, in March, 1751, left his eldest son heir-apparent, with every prospect of a long and successful reign. Brave, prejudiced, honest, in many respects a typical Englishman, his ambition was to play the part of a patriot king as it had been portrayed by Bolingbroke; and the nation was well disposed to second such an attempt.

<sup>1</sup> "Your right Jacobite, sir, disguises his true sentiment. He roars out for revolutionary principles; he pretends to be a great friend to liberty and a great admirer of our ancient Constitution; and, under this pretence, there are numbers who every day endeavor to sow discontent among the people. These men know that discontent and disaffection are, like wit and madness, separated by thin partitions; and they therefore hope that if they can once render the people thoroughly discontented, it will be easy for them to render them disaffected. By the accession of these new allies, as I may justly call them, the real but concealed Jacobites have succeeded even beyond their own expectation." So crushing was this retort that the patriots prudently refrained from dividing (Sir Robert Walpole's speech in the House of Commons, as given in 2 Lord Mahon's History, 263, 264).

The brilliant raid of the Pretender in 1745 had been fatal to the Jacobite cause, not so much through the defeat at Culloden as by showing that it might be strong in the Highlands, in Ireland, or in the support of France, but that Englishmen would not hazard life and fortune in its behalf. Men who, like Dr. Johnson, had been nurtured in the belief that the right of kings to govern was from God, might still theoretically adhere to the exiled line, but were nevertheless, with few exceptions, in common with the great body of the nation, ready to accept the youthful prince as their king.<sup>1</sup> Fourth in descent and third in succession from George I., it could not be denied that he had a prescriptive if not legitimate title to his grandfather's throne. Accordingly, when he assumed the crown as George III., the tide of loyalty reverted to its natural channel, and might with skilful pilotage have raised the sovereign above the control of Parliament. For many years there was no party in England capable of holding the king in check. The Tories, in obedience to their instincts, became the devoted adherents of the court, while the Whigs, who had, as the defenders of the Hanoverian succession as established by Parliament, regarded the first sovereigns of that house as clients rather than as masters, were now kept at a distance, and broke into factions in the selfish pursuit of place, or, more generous, went into opposition on behalf of the liberal principles that were endangered by the increasing influence of the Crown.

No circumstances could well have been more favorable for the restoration of personal government ; but the attempt was necessarily unsuccessful in the hands of one whose qualities would have been honored in a private station, but were too narrow for a throne.<sup>2</sup> The young king turned from his constitutional advisers to his groom of the stole, Lord Bute, who had gained an ascendancy over the royal mind which

<sup>1</sup> See Redgauntlet, vol. ii. ch. vii. p. 14; Croker's Boswell, ch. xvi. p. 147; Lord Mahon's History, vol. iv. ch. xxxvii. pp. 208, 209.

<sup>2</sup> "A better farmer ne'er brushed dew from lawn;  
A worse king never left a realm undone."—

BYRON: Vision of Judgment, stanza 8.

was wholly disproportioned to his abilities, and the favorite was appointed one of the Secretaries of State, with an influence which made him virtually prime minister and led to the withdrawal of the elder Pitt from the conduct of a war which owed its success to his genius. The motives for the change were merely personal; and it has been said with truth, that for many years, and while the king retained his reason, no statesman whom he disliked could obtain a seat in the cabinet, no policy be adopted which he disapproved. If the narrow and exclusive measures that lost the Colonies to England were initiated in Parliament, they received a constant and avowed support from the throne; and it was through the firmness of George III., in opposition to the great majority of the House of Commons, that the younger Pitt was able to make the appeal to the country which resulted in driving the ministry formed by the coalition between North and Fox from power, and making him prime minister of England. In these instances, as well as, later, on the question of Catholic emancipation, the king threw the weight of his character and rank into the scale with an inflexibility of purpose that had a marked influence on the course of events. But his intervention, though unmistakably sincere and honest, was seldom fortunate either for the nation or himself; and when on the recurrence of his malady, in 1810, the Prince of Wales became regent, kingly government, in the full sense of the term, ceased to exist in England.<sup>1</sup>

<sup>1</sup> Gneist, *The English Parliament*, p. 312.

## LECTURE XI.

The English Constitution (*continued*). — Exclusion of the Crown from Participation in Legislation. — Decadence of the House of Lords. — Royal Prerogatives now wielded by the Commons through the Cabinet. — The Power to dissolve Parliament. — England a Commonwealth rather than a Monarchy.

THE subordination of the executive department of the government to Parliament is not the only change that has occurred in the English Constitution since the reign of Queen Elizabeth; there is another, by which the Crown has been virtually excluded from all share in the making of the laws. Technically and legally speaking, the enactment of a statute requires the united voice of King, Lords, and Commons; unless they all concur, the bill falls. There was a period in English history when this was more than a legal fiction, when the Crown not only might, but did, modify, amend, or reject measures that had received the assent of both Houses of Parliament;<sup>1</sup> but when the power of the Crown came to be vested in a ministry delegated by and representing a majority of the House of Commons, such a veto ceased to be practicable, because the prime minister was responsible for

<sup>1</sup> 1 Green's History of the English People, 461. "In former times the course of petitioning the king was this: the Lords and Speaker prepared their petition to the king. This then was called the bill of the Commons, which being received by the king, part he rejected and put out, other part he certified; and as it came from him it was drawn into a law. But this course, in the 2d Henry V., was found prejudicial to the subject; and since in such cases they have petitioned by petition of right, as we now do who come to declare what we demand of the king; for if we should tell him what we should demand, we should not proceed in a parliamentary course" (Speech of Mr. Glanville at the conference between the Houses of Parliament on the clause annexed by the Lords to the Petition of Right, 2 Parliamentary History, 365).

the acts of the king, and could not consistently sanction the defeat of a measure which he had advocated in his place in Parliament. This check on the popular will has accordingly ceased to be a part of the English Constitution. If a law passes both Houses of Parliament, it must receive the assent of a king who can only speak through ministers who are the delegates and leaders of the majority that enacts the law.

There has been another change within the walls of Parliament. As late as the reign of Queen Anne, and for some time afterwards, the House of Lords was not only an integral, but a co-ordinate and equal branch of the government. To have its support was as important as to have a majority in the House of Commons, and no measure which the great body of the peerage disapproved could well be passed over their heads by popular agitation. But as the constituency which the Lower House represented grew in intelligence and information; as wealth flowed into the great commercial cities and manufacturing towns, and the influence of the untitled gentry balanced or outweighed that of the peers, — the Commons rose to be the great council of the nation, and the power of the House of Lords diminished in a like proportion. This change, which had been going on for a length of time, culminated in the passage of the Reform Bill. The rejection of that measure by the Upper House in October, 1831, led to a violent agitation throughout the kingdom. Another bill of the same nature was passed by the Commons in the following year; and although the Lords manifested their repugnance by a vote, taken on the 7th of May, that would have been decisive had there been no pressure from without, their opposition ceased in obedience to the counsels of the Duke of Wellington, and a month afterwards the bill became a law. This result placed the weakness of the Lords in a light that could not be misunderstood; they have since been virtually a revisory committee, rather than a co-ordinate branch of the legislature; and it may safely be predicted that they will never again come to a grave political issue with the assembly which, from its origin and nature, has public opinion on its side and represents the will of the English nation.

The battle of the aristocracy will be fought hereafter, as it has been during the last forty years, in the House of Commons; and if lost there, will not be renewed in the assembly which was once the citadel of privilege. The Lords are, nevertheless, a useful check on rash and inconsiderate legislation; and when the question does not touch the popular heart, may amend bills that have been passed by the Commons, or reject them absolutely.

In estimating the relative strength of the two branches of the English legislature, it must not be forgotten that the powers incident to the prerogative are virtually wielded by the cabinet, which is the creature of the Commons and responsible to them;<sup>1</sup> and it is not surprising that this additional weight should render the scale of the popular assembly preponderant, when it might otherwise be balanced by the peers. It is in this sense that we must understand various utterances of the Duke of Wellington, and among others, that the bill for the repeal of the corn laws "having been already agreed to by the other branches of the legislature, the function of the House of Lords was at an end."<sup>2</sup> For as the Queen can only speak through a minister whom the Commons approve and will support, his voice is practically hers, even when he is endeavoring to carry a measure to which she may be personally adverse. Such a use of the executive power for the furtherance of popular ends, or in aid of the dominant party in the Commons, is the more likely to occur because since the prerogative came under the control of a ministry whom Parliament delegates and may dismiss, it has not been an object of distrust; and acts are viewed with complacency that would have provoked resentment had they proceeded from the royal will.<sup>3</sup> If the Lords had not withdrawn their opposition to the Reform Bill, it would undoubtedly have been carried over their heads by the creation of new peerages at the instance of Earl Grey's Government, despite the extreme reluctance of

<sup>1</sup> 1 May's Constitutional History of England, 457.

<sup>2</sup> Disraeli's Life of Lord George Bentinck, 229; Sheldon Amos, Fifty Years of the English Constitution, 349.

<sup>3</sup> 2 May's Constitutional History of England, 136.

William IV.<sup>1</sup> So the sale of commissions in the army was abolished in 1871, during Mr. Gladstone's first administration, by a royal warrant after the bill which the Commons had passed for that end had been rejected by the Peers. In like manner, while the canons are formally convened to choose a bishop, they yet must vote for the candidate who is designated by the Crown, or incur the pains and penalties of a *præmunire*; the nomination being really made by the cabinet, and depending in the last resort on the popular will as manifested in the elections for the House of Commons.<sup>2</sup> Among the many anomalies of the English government none is more characteristic. Although not answering to Cavour's ideal of a free church in a free state, it is yet eminently practical and just, because one who as a spiritual peer is to take part in the task of legislation, should obviously derive his authority from a national and not from an ecclesiastical source.

If we now inquire what measure of personal authority remains to the sovereign, the answer is that he can do nothing save through ministers whom he appoints but cannot choose, and who are responsible for his acts before the country and to Parliament. So close is the watch, so little is needed to excite distrust, that a telegram to Queen Victoria from the Indian viceroy, Lord Lytton, announcing the advance of the British troops on Afghanistan, and a sympathetic note from her Majesty to Lord Chelmsford, then commanding the forces in Zululand, became the theme of injurious comments in the Press, and gave occasion for a critical debate in the House of Commons, in the course of which Sir Stafford Northcote admitted, in replying for the Government, that if Lord Lytton's object had been to obtain the Queen's support for a policy that was not approved by the cabinet, it would have been a serious offence against the Constitution of the country and the privilege of Parliament.<sup>3</sup> Strange as it may seem, the Queen cannot name her ladies-in-waiting or mistress-of-the-robcs without consulting the prime minister,

<sup>1</sup> 1 May's Constitutional History of England, 260.

<sup>2</sup> Green's History of the English People, vol. ii. ch. iv. p. 160.

<sup>3</sup> Sheldon Amos, Fifty Years of the English Constitution, 333.

and must dismiss them if an incoming administration insists on such a change.<sup>1</sup> The husband of a queen-regnant is not less jealously regarded than herself, and may not take part or manifest an interest in the politics of his adopted country. The presence of Prince Albert in the House of Commons during Sir Robert Peel's speech for the repeal of the corn laws drew forth a grave remonstrance from Lord George Bentinck as the leader of the opposition, and was, according to Mr. Disraeli, "disquieting to moderate men on both sides."<sup>2</sup> Such minutiae may seem trivial, but serve to indicate how little, save the mere show of authority, is left to an English monarch. The venerable and high-sounding term "prerogative" is now simply a technical and convenient form of expression for the powers that can legally be exercised by the executive department of the English government without the sanction of an act of Parliament, and which, though nominally belonging to the Queen, are controlled by the cabinet and ultimately by the House of Commons.<sup>3</sup>

From the above sketch we may see that the House of Commons has by slow degrees dispossessed the Crown and peerage, and is now the propelling and guiding force, the sails and helm of the English government. Raised from a subordinate position to be the hinge on which all else depends, it controls the House of Lords, selects the ministers, and wields through them the power of the Throne. The executive has in this way become the mouthpiece of the legislature; and if the independence of the judiciary is secure, the safeguard is in public sentiment, and not in constitutional provisions.<sup>4</sup>

<sup>1</sup> 1 May's Constitutional History of England, 131; Sheldon Amos, Fifty Years of the English Constitution, 231.

<sup>2</sup> Life of Lord George Bentinck, 106.

<sup>3</sup> 1 Green's History of the English People, 639, 682.

<sup>4</sup> "No doubt the time was when the king had a predominant power in England; but who can say that it is the case now? Without going into details, it is sufficient to say that the regal power is of such a nature now that it really affords no strong or sufficient check or balance in our Constitution.

"I am old enough to remember when the House of Lords measured

It must not, however, be supposed that the legislature and the executive are no longer distinct, or that the Constitution falls into the error of intrusting the administration of the government to a numerous and popular assembly. The course and policy of the government are determined in the cabinet; and a resolution of the House of Commons directing that an individual should be appointed to an office of trust or profit, or that a particular measure should be adopted in peace or war, would be universally regarded as unconstitutional. Though the power of choice and dismissal is in the House, the ministers are not merely its servants or delegates; and if failure or loss ensues, the responsibility is theirs.

An inquiry may here be made which deserves an answer. Since Parliament virtually nominates the ministry and may compel them to resign, what security is there against an arbitrary and capricious exercise of its power which may prevent the execution of a settled policy and render the executive the slave of the legislature? The answer is, that the cabinet may advise the Crown to dissolve Parliament and bring its members before their constituents to answer for their conduct. The creature thus has a check on the creator,

itself with the House of Commons, and challenged or overthrew its decisions. Who can say it is so now? That check also has departed. The fact is, the whole power of executive administration is vested in the government of the day, and that depends for its existence upon the House of Commons; and the whole power of this country, all that we have read of as divided among the different estates of the realm, has really now entirely centred itself in the House of Commons, and everything turns upon its will. I say that so far from these things being a complicated system of checks and balances, our Constitution has been reduced to a state of what I can only call tremendous simplicity. We have put all on a single foundation; all depends upon the House of Commons, upon their ability to conduct the business of the State properly; all depends upon their being able and willing to keep the ministers of the Crown within bounds, and to fulfil their duties to the State. We have, instead of a complicated Constitution, the most elementary Constitution in the world. We have simply an elective assembly; and in that elective assembly all the powers of the State are really gathered up, and in it they are centred" (Speech of Mr. Lowe in the House of Commons, March 4, 1879). Sheldon Amos. *Fifty Years of the English Constitution*, 26.

the servant on the master ; and may, if a difference arises, call in the nation as an arbiter.

It is no doubt conceivable that an artful and designing monarch might unite with a Parliamentary cabal to remove an obnoxious minister without permitting an appeal to the people ; but such a course would increase the influence of the statesman whom it was designed to crush, and insure his ultimate return to power.

There is a consideration which should not be overlooked in determining how far a king of England is a free agent ; namely, that the measures of a constitutional sovereign are presumed to be adopted, not of his own motion, but in pursuance of the advice of some one who is answerable for the consequences. The first step, therefore, towards getting rid of a prime minister who is sustained by the House of Commons is, as I have already intimated, to find a statesman who will accept his place, and with it the responsibility of recommending a dissolution of Parliament. If there is no such person, the existing ministry must be retained ; but if he is forthcoming and succeeds in forming a government, it will still be merely provisional, and the event will depend upon the result of the elections. Should this be adverse, the newly appointed ministry must resign and the king recall the servants whom he had recently dismissed. A course attended with so much doubt and uncertainty, and which may involve so much mortification, should obviously not be recommended by a statesman or adopted by a sovereign unless in a case of extreme exigency and on exceptional grounds. Accordingly, Mr. Bagehot tells us that “ the power of dismissing a government with which Parliament is satisfied, and dissolving that Parliament upon an appeal to the people, . . . has almost, if not quite, dropped out of the reality of our Constitution. . . . That power in theory indisputably belongs to the Queen ; but it has passed so far away from the minds of men that it would terrify them, if she used it, like a volcanic eruption from Primrose Hill.” The last occasion on which an English sovereign ventured on such a course was when William IV. dismissed the Whig ministry and formed a Tory administration under

Sir Robert Peel; and the event showed that he had miscalculated. The precedent is the more instructive because the great majority of the House of Lords were with the king.

The recent course of events on the other side of the Channel has afforded the English people an opportunity of showing that their judgment on this constitutional question is not unlike that pronounced by Mr. Bagehot; for when President McMahon made the inability of the republican ministry to obtain a majority in the Senate an excuse for dismissing them and dissolving the Lower House, the measure was generally disapproved in England, and its ultimate failure regarded as a proof that liberty is possible in France. Sir Thomas May is indeed pleased to say, in a recent work of authority, that "a constitutional government secures to the king a wide authority in all the counsels of the State. He chooses and dismisses his ministers. Their resolutions upon every important measure of foreign or domestic policy are submitted to his approval; and when that approval is withheld, the ministers must either abandon their policy or resign their offices." This may have been true when Blackstone wrote, in the days of George III., and down to the beginning of this century, but has long ceased to apply to a government which, though in aristocratic hands and with the forms of royalty, is virtually a commonwealth.

Though I have called England a commonwealth, it is not easy to find a name for that which is essentially of modern growth, and has no analogue in history. Were I to choose an appellation, I should incline to "republic" rather than "monarchy," as coming nearer to the truth. The distinctive difference is not that the English government is monarchical and ours republican, but that it is subject to an aristocratic influence which is wanting here. Do away with the law of primogeniture and with the custom, stronger than the law, of endowing the eldest son, and the English régime would in less than half a century be more entirely democratic than that under which we live, because the popular will would proceed straight to its object, without meeting with the checks which are so numerous in the United States. It may be said

that the shadow and the substance of royalty are alike inconsistent with the definition of a republic; but such a rule would exclude Sparta, Tyre, and her offspring, Carthage. Governments professedly republican have differed more widely in form and principle than does the French republic from monarchy as it exists in England. Which is the more truly republican, a country like the United States, where the executive may thwart the popular will during a four years' term of office; or a country where, as in England, the cabinet must conform to the views of the legislature or resign? No lover of his country, whether royalist or a favorer of self-government, could be satisfied with the state of things in England in the eighteenth century, save as an escape from greater evils; but a sincere republican may uphold a system under which the representatives of the people administer the government, and the name of king simply adds a sanction. Such seems to have been the opinion of Horace Walpole, who describes himself as "a quiet republican, who does not dislike to see the shadow of monarchy fill the empty chair of State, that the ambitious, the murderer, the tyrant may not aspire to it; in short, who approves the name of a king when it excludes the essence."<sup>1</sup> Such a republic, as exemplified in the English government, was undoubtedly Hamilton's ideal; and his undisguised, though abstract, preference, which he did not attempt to reduce to practice, lessened his influence by exposing him to the imputation of seeking to introduce monarchy on this side of the Atlantic.

It must not, however, be inferred that an English sovereign is necessarily a cipher. If, as Sir Stafford Northcote authoritatively declared from his place in Parliament in April, 1879, it is the Queen's right *to be consulted, to encourage, and to warn*, she is necessarily entitled to full information of all that occurs in the cabinet or Parliament, and may exercise an influence that will to some extent compensate for the power that the Crown has lost.<sup>2</sup> The letters of the Queen and

<sup>1</sup> Memoirs of the Reign of George II., vol. i. ch. xii. p. 377.

<sup>2</sup> Sir S. Northcote's speech, in *Fifty Years of the English Constitution*, by Sheldon Amos, 333.

Prince Albert to the premier, Lord Aberdeen, during the Crimean War, urging vigorous measures and deprecating the moderation of his language in the House of Lords, may be cited in proof of this remark.<sup>1</sup>

So also the sovereign may, when occasion requires, counsel moderation or the suppression of an indiscreet passage in a despatch. But for the sage intervention of the Queen, Lord John Russell's demand for the surrender of Mason and Slidell would have been couched in language that might, in the then temper of the American people, have provoked a refusal, and led to a contest in which England would have joined hands with the Southern States, with results that would have been calamitous to the cause of civilization throughout the world.

The Crown is not a mere formal appendage to the machine of State, or one of those organs which sometimes in the political, as in the natural, body outlast the need that called them into being, and can neither be retained with advantage nor excised without risk, but is an integral part of the Constitution, which could not be laid aside without endangering the harmonious working of the entire system. Not only does the loyalty, which, as we learned during the late civil war, is a phase of patriotism, gather round the Throne and form a useful counterpoise to the unthinking hero-worship which is prone to deify the demagogue or the successful general, but there is less to be apprehended from the vulgar ambition which aims at the show as well as the reality of power, when the first place is held by an hereditary tenure, and the task of government relegated to subordinates who may be removed at pleasure.<sup>2</sup> It is because the cabinet is the result of a process of evolution on which the Queen sets the seal, by summoning the leader of the House of Commons to Windsor, that ministers come and go with less disturbance of social and business life than would presumably ensue if the choice of a chief magistrate were submitted formally to Parliament or determined by a popular vote.

<sup>1</sup> Sheldon Amos, *Fifty Years of the English Constitution*, 218.

<sup>2</sup> Walpole's *Memoirs of George II.*

## LECTURE XII.

The English Constitution (*continued*). — Parliamentary Representation. — Anomalies and Defects of the Electoral System at the Close of the Eighteenth Century. — Corruption at Elections and in the House of Commons. — Fox. — Walpole. — The Movement for Reform. — Pitt. — Burke — Reform Acts of 1832 and 1867.

HAD the House of Commons continued to be what it was during the greater part of the eighteenth century, it might not have become the mainspring of the government, and certainly would have been unequal to such a function. Though nominally a representative assembly, it was really chosen by a comparatively small number of persons who belonged to the privileged or wealthy classes, and did not represent the national will. The counties and some of the larger towns might still speak with a popular voice, although even they were largely influenced by family and fortune; but it has been authentically stated that at the close of the last and during the earlier years of this century 487 members, constituting a majority of the Commons, were chosen by some five or six thousand voters, distributed among boroughs which, in the significant language of the times, were "rotten," and voted as their patrons dictated, or close corporations where admission to the suffrage depended on the will of the existing corporators or freemen, who distributed the right among their families and adherents, and took care that the voters should not be too numerous to enable each one to make a profitable bargain. Agreeably to Oldfield's Representative History,<sup>1</sup> 177 members were returned at the bidding of 123 commoners, and 304 nominated and virtually elected by 144 peers; so that while the Lower House was, on a superficial view,

<sup>1</sup> pp. 531, 543.

the dominant assembly it was in reality largely influenced, if not controlled, by the Upper. This was one of the points made by the opponents of reform, who insisted that the existing method rendered both branches harmonious, and lessened the risk of a collision.<sup>1</sup>

The abuse was not entirely barren of good results. The much-needed reform in the criminal law was due to the exertions of Sir Samuel Romilly, who sat for a purchased borough; and not a few of the "borough-mongers," as they were opprobriously termed, used their power wisely to bring able and upright men into Parliament, who might otherwise have been left out of public life.<sup>2</sup>

The elder and younger Pitt, Burke and Fox, in the last century, and Canning and Horner in this, owed their early rise to such means; but there were others who bargained shamelessly with successive ministries for title, place, or opportuni-

<sup>1</sup> "Dr. Oldfield's Representative History furnishes still more elaborate statistics of parliamentary patronage. According to his detailed statements, no less than 218 members were returned for counties and boroughs in England and Wales by the nomination or influence of 87 peers; 137 were returned by 90 commoners, and 16 by the government; making a total number of 371 nominee members. Of the 45 members for Scotland, 31 were returned by 21 peers, and the remainder by 14 commoners. Of the 100 members for Ireland, 51 were returned by 36 peers, and 20 by 19 commoners. The general result of these surprising statements is, that of the 658 members of the House of Commons, 487 were returned by nomination, and 171 only were representatives of independent constituencies." 1 May's Constitutional History of England, 300.

Writing in 1821, Sydney Smith says: "This county belongs to the Duke of Rutland, Lord Lonsdale, the Duke of Newcastle, and about twenty other holders of boroughs. They are our masters."

<sup>2</sup> "During the debates on the Reform Bill, Sir Robert Peel produced a list of twenty-two individuals, including almost every illustrious name which during the last fifty years had adorned the national councils; and of these twenty-two persons it appeared that *sixteen* were, on their first entrance into public life, returned for boroughs which it was proposed by the bill before Parliament to disfranchise, while of the remaining six, who had owed their return in the first instance to a more popular constituency, *five* had at a subsequent period of their public career found it convenient to quit that constituency and betake themselves also to a close borough." Quarterly Review for 1831, p. 259.

ties to grow rich at the public expense. Patronage was as flagrantly abused by Walpole, Newcastle, and Bute as it can be by an American President or Senate. The ministry unscrupulously dismissed every public servant who ventured to oppose their measures or cast an independent vote; and the public conscience was so undeveloped in this regard that as good and wise a man as Dr. Johnson could declare: "The government has the distribution of offices in order that it may maintain its authority. Were I in power, I would turn out every man who opposed me."<sup>1</sup> Not a few of the peerages which were profusely created under George III. originated in sources like those stigmatized by Pope:—

"Mark by what wretched steps their glory grows,  
From dirt and seaweed as proud Venice rose;  
In each how guilt and greatness equal ran,  
And all that raised the hero sunk the man."

In fine, demoralization reached the point at which men cease to believe in the possibility of virtue, and patriotism came to be regarded as a mask worn by adventurers who sought for office under the pretence of love of country.<sup>2</sup>

<sup>1</sup> 2 Fitzgerald's Boswell, 17.

<sup>2</sup> "Gentlemen have talked a great deal of patriotism, — a venerable word when duly practised; but I am sorry to say that of late it has been so much hackneyed about that it is in danger of falling into disgrace: the very idea of true patriotism is lost, and the term has been prostituted to the very worst of purposes. A patriot, sir! why patriots spring up like mushrooms! I could raise fifty of them within four and twenty hours; I have raised many of them in one night. It is but refusing to gratify an unreasonable or an insolent demand, and up starts a patriot. I have never been afraid of making patriots, but I disdain and despise all their efforts." Walpole's speech in the House of Commons, Feb. 13, 1741; 3 Mahon's History of England, 73, 74. See also Walpole's Memoirs of the Reign of George II., vol. i. ch. xii. pp. 376, 377. So Johnson defined patriotism as "the last refuge of a scoundrel;" and when Boswell, pressed "to name a single exception, mentioned an eminent person whom we all greatly admired," Johnson's reply was, "I do not say he is not honest, but we have no reason to conclude from his political career that he is honest." 2 Fitzgerald's Boswell, 11.

The curious in such matters may read in the Quarterly Review for January, 1878, p. 189, some account of the disreputable methods by which

The result was an assembly as diverse as the soil from which it sprang, where men of lofty tone and brilliant genius sat on the same benches with place-hunters, political adventurers, and "fools of quality" with scarce wit enough to be rogues, — where, in short, heterogeneous elements were commingled, and "all the gravel mixed with golden ore." But the splendor of individual talent did not redeem the House as a whole from the taint of its baser particles, or render it a fit instrument of government, save in the hands of some minister wise as Walpole or magnanimous like the elder Pitt.

Some conception of what public life and morals then were in England may be gathered from Horace Walpole's account of the Duke of Newcastle, and Bubb Dodington's unblushing narrative of his shameless bargain for place, in which he was as shamelessly outwitted by the Duke.<sup>1</sup> Newcastle and Dodington were below the standard even of their day; but this remark does not apply to a contemporary statesman, who was exceptional only as regards ability. The elder Fox was remarkable among the brilliant debaters of his time for close and cogent reasoning, clothed in forcible and expressive language, and could, as we learn from Horace Walpole, beat all the lawyers in the House at their own weapons. Had these powers been joined to a love of country and the just pride which will not stoop for power, he might have claimed a first place, or been a worthy coadjutor of Pitt. Unhappily, his main object was to accumulate wealth and leave it with a peerage to his children. No means seemed to him degrading that tended to these ends, and he consented to take office, with the leadership of the House of Commons, as the "man" of the Duke of Newcastle, "who was to remain in full power, with the whole confidence and secret of the king." The negotiation was broken off because the Duke insisted on keep-

the attorney Lamb founded the family which was ennobled in the second generation, and in the third gave a prime minister to England in the person of Lord Melbourne. So Bubb Dodington became Lord Melcombe, through the ability to return four members to Parliament, and his readiness to sell their votes to the highest bidder.

<sup>1</sup> Dodington's Diary, 257, 308.

ing the distribution of the secret-service money entirely to himself, though Fox declared that "he never desired to touch a penny of it, or to know to whom it went" further than was necessary to speak to the members without appearing ridiculous.<sup>1</sup> In other words, he could not lead the House without knowing which of its members had accepted bribes, and who might be regarded as still for sale.

Were this all, Fox might have passed for an honorable man ; but his reputation received a fatal wound when he turned his back on Pitt and his traditions as a Whig to become the tool of the court and earn from Bute a right to retain the paymastership which he had held under Newcastle. The bait was a tempting one, because the lax morals of the age permitted the paymaster to lend the public moneys in his hands at usurious rates of interest, and keep the profits as a legitimate official perquisite. Fox was not the man to neglect such an opportunity, and in a few years amassed an enormous fortune by methods which would have been flagitious had they not been so long practised as to have grown into a custom which could be followed without reproach. He is depicted in Trevelyan's recent biography of Charles James Fox as a political buccaneer whose hand was against every man and in every corner of the national till. It is not easy to be at once epigrammatic and just, and I believe that there is no evidence that Fox was guilty of embezzlement, or concerned in such combinations to defraud the government as are said to have occurred in the United States ; but he was careless of principle, and consistent only in the pursuit of place and wealth.<sup>2</sup>

<sup>1</sup> Or, as the story is told by Horace Walpole: "Mr. Fox represented that if he was kept in ignorance of *that*, he should not know how to talk to members of Parliament when some might have received gratifications, others not." *Memoirs of the Reign of George II.*, vol. i. ch. xii. pp. 382, 383. Walpole adds: "The auction of votes is become an established commerce, and his grace did nothing but squabble for the prerogative of being the sole appraiser."

<sup>2</sup> Pitt had some years previously deposited the entire balance in his hands, as paymaster, in the Bank of England, and declined every indirect advantage; see Thackeray's *Life of Chatham*, vol. i. ch. vi. p. 148; but such disinterestedness was exceptional, and the example was lost on Fox.

It is enough to add, without accumulating instances, that corruption was so general and inwrought that, in the judgment of many practical and some philosophic minds, it could not be eradicated without endangering the equilibrium of the entire system.<sup>1</sup> For as the independence of the executive was still regarded as indispensable, and no one had yet formulated the idea that the Crown can be properly subordinated to the House of Commons in all that regards the administration of the government, it seemed impracticable to uphold the royal prerogative or bridge the gulf between the king and Parliament without a recourse to the means that had proved so efficient in the hands of Walpole, and which the lax moral sense of the age but faintly condemned.

Such was the House of Commons when George II. was king, and such it continued to be for many years under his successor. Seldom has venality been more shameless than in the first Parliament of George III.; and Lord Chatham declared from his place among the peers in February, 1770,

<sup>1</sup> See 5 Elliott's *Madison*, 152, 229, second edition, and the *History of the American Republic*, etc., iii. 309, by John C. Hamilton, for Hume's opinion on this point, as quoted by Alexander Hamilton. It is noteworthy that Hamilton and Jefferson, while differing on most points, would seem to have coincided in the then generally received belief that the English government was, despite its defects, the best that had yet been devised. See Jefferson to Lafayette, Feb. 28, 1787, 2 Jefferson's *Works*, 101.

Jefferson relates the following anecdote, and attests "the God who made him for its truth." At a cabinet dinner at his house the conversation turned on the English Constitution, and Adams observed: "Purge that Constitution of its corruption, and give to its popular branch equality of representation, and it would be the most perfect Constitution ever devised by the wit of man." Hamilton paused, and said: "Purge it of its corruption and give it equality of representation, and it would become an impracticable government. As it stands at present, with all its supposed defects, it is the most perfect government which ever existed." Notwithstanding the writer's implied doubt as to his credibility, the story is probably correct, but does not justify his inference that "Hamilton was not only a monarchist, but for a monarchy based on corruption." What it proves is simply that Hamilton thought, with Hume and Johnson, that liberty and authority could not be reconciled under such a system without the aid of the influence indirectly exerted by the Crown.

that the Commons had slavishly obeyed the commands of his Majesty's servants, and had thereby proved to the conviction of every man what had been only matter of suspicion before, — that ministers held a corrupt influence in Parliament; and again, not long afterwards, that bribery was rife in both Houses, and indicated the civil list as the source whence the money came, and the monarch's hand as the one which drew the purse-strings.<sup>1</sup>

The dawn of a purer day had nevertheless been heralded by William Pitt, now generally known as the Earl of Chatham, who at the age of twenty-three stood forth as the opponent of Walpole and of the abuses by which he sought to consolidate his power. Reformers are generally regarded by the men in office as hypocritical pretenders who veil interested motives with the cloak of patriotism, and are only anxious for a share of the spoils. "We must at all events muzzle that terrible cornet of horse," said the minister; and when he found Pitt incorruptible, deprived him of his commission.<sup>2</sup> Pitt's eloquence swelled the storm of opposition, which caused the failure of the "Excise Bill;" and Walpole not long afterwards was compelled to withdraw from office and public life. While much that was urged against him was unfounded, there can be no doubt that he used patronage and the secret-service money to demoralize and control Parliament, nor that his downfall was largely due to Pitt's fervid utterances and the awakened moral sense to which they appealed.

In the eyes of the men of that day little seemingly was gained. The fall of Walpole left the way open for competitors who used the same means for lower ends, and corruption

<sup>1</sup> "Does he [*i. e.* the king] mean, by drawing the purse-strings of his subjects, . . . to procure a Parliament like a packed jury, ready to acquit his ministers at all events? I do not say, my lords, that corruption lies here, or that corruption lies there; but if any gentleman in England were to ask whether I thought both Houses of Parliament were bribed, I should *laugh in his face* and say, 'Sir, it is not so,' " [or, according to Mr. Trevelyan, "He knows it to be true."]

<sup>2</sup> Thackeray's *Life of Chatham*, 14.

was more shameless and avowed under George III. than at any previous period of English history. Fruitless as the efforts for reform may have seemed, they were nevertheless not wholly lost. In estimating the good done by a statesman, regard must be had, not merely to the success of his measures, but to the influence which his life and character have on his contemporaries, and through them on posterity. If Washington deserves to be first in the hearts of his countrymen, it is not only for his steadfastness in war and firmness and sagacity as chief magistrate; his life and character are an ideal which has raised the tone of the American people, and afford a standard by which to judge the conduct of men in public life. Tried by a like test, Chatham stands foremost among the statesmen who have benefited their country, and through her mankind. At a period when politics had sunk to low-water mark; and intrigue, patrician influence, and corruption were the beaten paths to office, Pitt rose by the sheer force of character and eloquence to a moral height which no English minister had previously attained; and the nation showed its appreciation of such greatness by honoring him with a confidence not surpassed by that accorded long years after to his son as "the pilot who had weathered the storm." He thus forced his way into the cabinet, notwithstanding the disinclination of the king and the jealousy of colleagues who were dwarfed by his genius, and assumed the exclusive conduct of the war with France, which became glorious and successful in his hands. Though driven from the cabinet by intrigue, and foiled when in opposition through the undue influence of the Crown, he prosecuted the struggle for reform with unabated zeal and an eloquence which, though unavailing to convince assemblies that were subservient to the Crown, commanded the attention of the nation. His efforts were seconded by the marvellous wisdom and lucidity of Burke, and led to a change in the tone of public sentiment which told with cumulative effect on Parliament. What the father had been unable to accomplish took place under the son, who gave England a purer administration than any she had known since the accession of the Stuarts. Though una-

ble to prosecute his plan for the reform of Parliament, owing to the stress of the mortal contest with France, and sanctioning a recourse to bribery in every form to secure the union with Ireland, which he deemed necessary to the welfare of both countries, and to avert the subjugation which would have placed England under the heel of Napoleon, Pitt was yet in public as in private life above suspicion, and would have disdained to use such means for personal or ambitious ends. So his contemporary Fox, though contrasting with his great rival in a love of pleasure and an inordinate fondness for play, was yet like him in honor beyond reproach; and the same remark applies to Wilberforce, to Canning, Grey, Windham, Horner, Romilly, and the crowd of distinguished names which filled the rolls of Parliament during the first half of the nineteenth century. I do not assert that public life was throughout this long period sincere or faultless, that votes were not changed and party ties formed or broken from a desire for power or the hope of office; such motives may have a legitimate place in every bosom, and sometimes unconsciously influence pure and honest men. What I mean is, that corruption, in the gross and necessarily degrading form of a pecuniary bribe, was not known or practised in the English Parliament after the opening of the great struggle with revolutionary France gave a definite aim to public life and raised party above the level of faction. Such an inference may the more reasonably be drawn because the memoirs which profess to give the secret history of the times contain, so far as I am aware, no such charge or insinuation, even when proceeding from the pen of writers who, like Romilly, were keenly alive to the abuses of the existing system, or the literary gossips who, like Greville, gathered the floating talk of society and the clubs for the entertainment of posterity.

Lord Brougham bears emphatic testimony at once to the general purity of Parliament and the corruption of the elective franchise, in a work published in 1860, towards the close of his life; and he relied on the contrast as a proof that representative government may bear good fruit, even when springing from an impure soil. "I have," he says, "sat in

Parliament for above fifty years, and I never even have heard a surmise against the purity of the members, except in some few cases of private bills promoted by joint-stock companies. I had been considerably upwards of a quarter of a century in Parliament before I even heard such a thing whispered; and I am as certain as I am of my own existence that during the whole of that period not one act of a corrupt nature had ever been done by any one member of either House. I question if any one election had ever taken place during the same time in which many electors had not been influenced by some corrupt motive or other in the exercise of this sacred trust.”<sup>1</sup>

Parliament was thus reformed by the force of public opinion before the political reformation which took place in 1832, and the same power gradually purified the administration of the government. It came gradually to be considered that ministers should not use their patronage as an instrument for returning their adherents to Parliament or influencing them when there; the public servants were permitted to vote as conscience or inclination dictated, without fear of dismissal; and contracts were no longer systematically jobbed as a means of rewarding political services. In fine, England ceased to present the painful spectacle of a government employing the powers with which it had been endowed for the common good, to corrupt the people or the persons whom they have chosen as their representatives.

Unhappily government was not the only bidder, nor “parliamentary interest the only marketable ware.”<sup>2</sup> The virtue of a community is ordinarily in the inverse ratio of the temptations to which it is habitually exposed, not be-

<sup>1</sup> Brougham on the British Constitution, ch. iv. sec. vii.

Some black sheep would seem, as this essay intimates, to have found their way into the House of Commons after the popular flood-gates were thrown open by the passage of the Reform Bill; and Mr. Tremenhoe candidly admits, in a work on the Constitution of the United States published in 1854, that the history of English railway legislation “has left stigmas behind it which we should be glad to forget;” but he adds what is, I believe, true, that the “corrupt elements are exceptions.” Tremenhoe on the Constitution of the United States, 143, 144.

<sup>2</sup> See Dodington’s Diary, 257, 308.

cause all men yield under pressure, but because many are not strong enough to resist; and when a vice has become common, mankind are no longer deterred from practising it by the sense of shame. When once it was ascertained that bribery was the usual, and not infrequently the only, practicable avenue to the House of Commons, there were few who hesitated to commit a breach of morals which the majority were ready to condone. Gentlemen of high degree, whom no one would have ventured to approach with a dishonorable hint or solicitation, did not hesitate to sanction the use of every art to debauch the honest voter and enlist the profligate. In many boroughs the electors did as the owners bade; but when they were interested or spirited enough to invite a contest, the scene which ensued was one which required the pencil of a Hogarth, and which the pen cannot readily portray. The doors of the public-houses were thrown wide in every quarter to the thirsty; every itching palm was filled with gold; the tradesman was threatened with the loss of custom, and the tenant who cast an independent vote ran the risk of an eviction, or incurred a disfavor which might be equivalent to ruin. Happily an election was not held every year; but it recurred often enough to render the exercise of the right of suffrage, which should be the political education of the freeman, a means of debasing the people, rather than elevating them. But for the native honesty of the English race, the evil might have been greater than it actually proved; but it went far enough to infect the lower classes with a greed for petty gains, and to indispose them to render any service, however trifling, without looking for pay.

The disfranchisement of the close and "rotten" boroughs, and the extension of the suffrage which took place in 1832, and subsequently in 1867 under the auspices of Mr. Disraeli, did much toward restoring the purity of the elective franchise. If these reforms and the stringent acts passed by Parliament have not eradicated the bribery in which the best and noblest in the land have so long indulged, which lately pervaded the counties and had a controlling influence in many of the smaller towns, it is because the wealthy and cul-

tured classes incline to a practice which increases their influence, and in their estimation simply proves the venality of the voters, without reflecting on the candidate. Such casuistry may blind the conscience, but can never be a justification. The part of the tempter is more consonant with the pride which is natural to man than that of the tempted, but it certainly is not less criminal; and although there is some difference between the corrupt solicitation of a chancellor or of a member of the House of Commons, and buying one's way into Parliament from a borough which is on sale, both are contrary to rules of right, which always vindicate themselves when broken. Bribery will come to an end in England when society shall unsparingly condemn a vice which soils the hand that gives as well as that which is held forth to receive.<sup>1</sup>

These considerations have met with a like disregard in the United States, where shrewd capitalists and great incorporated companies have used money unscrupulously to obtain the grant of franchises, or to guard those already obtained from legislative interference. The employment of such means has been deemed excusable in some quarters, on the ground that fire must be fought with fire, and that if wealth is shut out from a direct participation in the government, it will make its influence felt indirectly; but it is suicidal in the long run, by rendering the masses distrustful of their rulers, and weakening the moral sense, which is the only sure guaranty for property. Banks and railways are good things in themselves, but too dearly purchased at the cost of scandals like that of the *Crédit Mobilier*. If such practices had no other evil consequence than that of rendering mankind doubtful whether honesty is the best policy, they would still be a sin that ought to weigh heavily on the consciences of those who have sown the seeds of corruption in the halls of Congress and the State legislatures. There is such a thing as the remorse of virtue; and men who see compliance rewarded in some instances with cash in hand, in others with professional employment, in others again with political preferment, while they

<sup>1</sup> See 1 May's Constitutional History of England, 359, 367.

are left to poverty or neglect, may be weak enough to think that postponing success in life to honor is simply a want of worldly wisdom ; or if they do not moot the point, the community will do so for them, — and when such doubts assail the public mind, demoralization is not far distant.<sup>1</sup>

<sup>1</sup> See the London Spectator of Oct. 2, 1880, the Philadelphia Times of March 26, 1880, and the Evening Telegraph of March 28 of the same year, for the demoralizing effect of bribery on the English people and the legislative assemblies of the United States. "Ce qu'il faut craindre, d'ailleurs, ce n'est pas tant la vue de l'immoralité des grands que celle de l'immoralité — menant à la grandeur. Dans la démocratie, les simples citoyens voient un homme qui sort de leurs rangs et qui parvient en peu d'années à la richesse et à la puissance. Ce spectacle excite leur surprise — et leur envie — ils recherchent comment celui qui était hier leur égal est aujourd'hui revêtu du droit de les diriger. Attribuer son élévation à ses talents ou à ses vertus est incommode ; car c'est avouer qu'eux-mêmes — sont moins vertueux et moins habiles que lui. Ils en placent donc la principale cause dans quelques-uns de ses vices, et souvent ils ont raison de le faire. Il s'opère ainsi je ne sais quel odieux mélange entre les idées de bassesse et de pouvoir, d'indignité et de succès, d'utilité et de déshonneur." — La Démocratie en Amérique, ch. v. pp. 89.

## LECTURE XIII.

The English Constitution (*continued*). — Impeachment in Parliament and in Congress. — Disuse of the Veto Power by the Crown, and its Frequent Exercise by the President. — Relative Independence of the Judiciary in England and in the United States. — Advantages and Disadvantages of a Written Constitution compared with those of a Constitution resting only on Precedent.

It may be contended, and there is much to justify such an inference, that our government is more evenly balanced and attended with stronger safeguards than the English government as now constituted. The senate is not, like the House of Lords, the exponent of a privileged class, weak in numbers and inferior in wealth and influence to the landed gentry and great manufacturers who are represented in the House of Commons; nor is it, like the senate of the several States, a duplication of the Lower House, distinguished merely by a little more stability of tenure. It represents the States themselves, — those great political corporations which, properly regarded, are such important stays in the framework of our government. It is consequently less within the reach of the popular gales that blow so fiercely in a merely democratic assembly, and may keep the even tenor of its way when the waves of faction are running high in the House of Representatives.

The Senate has a peculiar importance, in view of one of the duties imposed upon it by the Constitution. We have seen that the executive function is really, as well as nominally, exercised in this country by a chief magistrate who holds his office from the people and may administer it in the way which he thinks most likely to promote their interest, with such deference to the views of Congress as a statesman should pay to the opinion of the department of the government

which most nearly represents the will of the nation. Such independence might obviously be attended with injurious consequences if there were no means of removing or punishing an incapable or corrupt President. Congress is accordingly entitled, as Parliament has always been in England, to visit official misconduct with an impeachment, followed by the conviction and removal of the offender; and there is in England the sharper and more stringent method of a bill of attainder. Such means were long and successfully employed by the House of Commons to combat the royal prerogative and defend the liberties of the subject; but as the power of the Crown came to be wielded in Parliament, the necessity for extreme remedies diminished, and they are now relics of the past that may never again be brought into actual service.

Had the existing method of the English Constitution been adopted in the United States, and the executive placed under the control of Congress, it might have been possible to dispense with the power of impeachment. But as the framers of the Constitution preferred to make the President independent of the legislature, it was requisite to provide a means through which he might be brought to trial, and if need be, deposed. It was accordingly declared that the President might be convicted by the Senate, on the accusation of the House of Representatives, and sentenced to removal from office, or, if his judges saw fit, branded with a perpetual disqualification. A difficulty here arose that could not so easily be obviated. What if Congress should, in its turn, abuse the power confided to it, and overawe the executive by the menace of an impeachment?

To guard as far as possible against this evil it was provided that the Senate should, when trying an impeachment, act on oath or affirmation, and that the concurrence of two thirds of all the members present should be requisite for a conviction. It was supposed that a grave and dignified body would not by so great a majority sanction a frivolous or unfounded accusation. No better means could have been devised; and yet in the worst case, that where the great body of the Senate are bound by party ties to a policy contrary to that adopted

by the President, the precaution may obviously be inadequate to the danger.

If less than one third of the senators were of the same party with the accused, he could not hope for favor, and would be fortunate if he received bare justice ; if more, it might be difficult to obtain a condemnation, even on the clearest proof of guilt. A politician called to decide on an accusation made by a political friend against a political enemy, is under a violent temptation, which even the firmest minds do not always successfully withstand. The evil was in the nature of things, and could not be avoided. It was necessary to choose between leaving the executive wholly irresponsible during his term of office, and subjecting his conduct to the revision of a tribunal that might not be impartial ; and the latter alternative was justly thought preferable.

It was long since remarked by De Tocqueville that a decline of public morals in the United States would probably be marked by the abuse of the power of impeachment as a means of crushing political adversaries or ejecting them from office ; and the conviction of Andrew Johnson might have been the first step in the downward path, if a few steadfast men in the Senate had not held the duty of administering justice above popular clamor and the dictation which the members of a political party find it so difficult to withstand.

There is another restraint on the popular will as declared in the House of Representatives. The seventh section of the first article of the Constitution requires that "every bill, order, resolution, or vote of Congress shall be presented to the President, and if he returns it with his objections, it shall not become a law without the concurrence of two thirds of both Houses." The power which had grown obsolete in England was thus made effectual here ; and this clause is one of many proofs that the framers of our Constitution drew their inspiration from the political history of the mother-country, and intended that the traditional checks and balance-wheels of the monarchy should not be wanting in the republic. Whether they were or were not aware that the administration of the English government was gradually passing

into the hands of a delegation from Parliament, they certainly did not intend to establish such a system in the United States, and leant in the opposite direction, by making the consent of the President, save in the rare and exceptional case of a two-thirds majority in both Houses, essential to new legislation, or to the repeal, alteration, or re-enactment of the laws already made. He thus became a third branch of the legislature, whose approval was ordinarily requisite to the success of any measure proposed by the other two. It was accordingly by a resolute veto that Jackson frustrated the re-charter of the Bank of the United States and subverted the financial policy which had, with a brief interval, prevailed from the outset of the government, and that Grant prevented the expansion of the irredeemable currency which had been bequeathed by the civil war; and we have seen the persistent attempts of Congress to extort executive assent, by making it the price of the supplies needed for the military and civil services, foiled by the steadfastness of Mr. Hayes. The power may not always have been wisely exercised; but its use is as consistent with the method of our government as it would be foreign to the spirit of the English Constitution in the form which it has finally assumed.

It is not merely in the independence of the executive that the government of the United States may be contrasted with that of England. The separate existence of the judicial power is, at least in theory, more distinctly marked, and attended with stronger guaranties. The English judges are, it is true, appointed for life, and have for nearly two hundred years fulfilled their duty with an impartiality that cannot easily be surpassed; but they may still be dismissed at any moment by Parliament. It is the assurance that Parliament will not abuse its power that secures their independence.<sup>1</sup> If the House of Commons were a merely popular assembly, it might not exercise this self-restraint, or the judges be so secure in

<sup>1</sup> The method prescribed by the statute 13 Wm. III. c. 2, is a removal by the Crown on the address of both Houses (1 Bl. Com. 267, 11); but a bill carried by a popular minister through the Commons would probably prevail, notwithstanding any reluctance of the king or the Lords.

their tenure of office. Moreover, Parliament may, as I have already intimated, blend the judicial and legislative functions, and by an attainder or bill of pains and penalties deprive an obnoxious individual of his property or life. It is not necessary that the offence should be political, or even that a legal offence should be alleged; the statute may be *ex post facto*, or sentence the alleged criminal without assigning a cause. I do not mean to imply that such a law is likely to be passed in England: there is perhaps no country where men are less in danger from arbitrary power; but the safeguard is in the temper of the House of Commons, which may in the course of time undergo a change.

From what has been said, it is obvious that if the executive department of the English government is distinct and separate, it is, notwithstanding, controlled and administered by agents whom the Commons select, and may dismiss at pleasure; and next, that although the separation between the legislature and the judiciary is more distinctly marked, it may be disregarded or effaced by Parliament. What, then, it may be asked, since Parliament is thus omnipotent, is the English Constitution? What distinguishes it from the various governments in which power is confessedly absolute? The answer is, that if the only limit to the authority of Parliament is that set by the reason and judgment of the Lords and Commons, they still proceed according to rules and precedents, which, having been handed down for ages, possess a restraining influence which written Constitutions sometimes want. Parliament might deal with a political enemy as it dealt with Strafford, — might arrogate to itself the trial of any cause that it did not choose to leave to the ordinary tribunals; might, if it saw fit, supersede the courts of justice by a commission acting under martial law. These things are possible; but centuries have passed since any Englishman has been deprived of life or goods, except by the judgment of his peers or in the due course of law prescribed by Magna Charta; nor does it enter into the mind of any Englishman to apprehend danger through the direct or indirect use of judicial or executive power by Parliament. On the contrary,

there is no assembly where a respect for vested rights and personal liberty is more deeply rooted, or that is less inclined to go beyond just bounds to the injury of either. When, on full investigation and debate, it appears that a measure cannot be adopted consistently with the principles of the Constitution, the argument is as conclusive as if the measure were one that Parliament could not adopt.

If we could reason with certainty from the example set by England to a country where the circumstances are in many respects different, and infer that the means which have been effectual there will prove equally successful in the United States, we might prefer a system that can be flexible when the occasion requires it, and bend to events without a sacrifice of principle. There is between a written and an unwritten Constitution something of the difference that distinguishes the natural integuments, which yield to the motions of the body and expand with the growth of every limb, from an artificial covering that may become too narrow in the course of time. A country bound by fixed rules prescribed by a former generation, which cannot be altered without a long and complicated process, may find itself powerless in the face of some unforeseen exigency, and be obliged to violate its organic law as the price of safety.

The English legislature is free to follow any course that will promote the welfare of the State; and the inquiry is not, "Has Parliament power to pass the act?" but, "Is it consistent with principle, and such as the circumstances demand?" These are the material points, and if the public mind is satisfied as to them, there is no further controversy. In the United States, on the other hand, the question primarily is one of power; and in the refined and subtle discussion which ensues, right is too often lost sight of, or treated as if it were synonymous with might. It is taken for granted that what the Constitution permits it also approves, and that measures which are legal cannot be contrary to morals. There is moreover an inconvenience of a different kind, — that the constitutional restrictions to which our government is subject may preclude the adoption of a measure which, though tran-

scending ordinary rules, is yet essential to the public safety at a critical period like that of the late civil war, or compel Congress to choose between sacrificing the republic to the Constitution, and violating the Constitution in order to preserve the republic.

Such are some of the evils incident to a written Constitution. Do they outweigh the benefits? Is it well to guard against the abuse of power by restrictions that may render it impotent for good? The inquiry is one of the most important that can occupy the mind, and may soon be the material difference between government as it exists in England and as it exists here. The advantage has not in the hour of trial been always on our side. Where the strict letter of the law prevails, both letter and spirit may sometimes be disregarded. Necessity has compelled us to violate rules where Parliament would simply have declared an exception. Nor is this all; in the wish to excuse a disregard of constitutional restraints in cases where they could not be observed consistently with the public safety, men have become special-pleaders, casuists, or, worse still, have learned to undervalue the principles on which such rules depend. Time only can solve the problem; and experience may yet show that the success of the English Constitution is due to the peculiar and complex nature of the House of Commons, which, instead of being the mere exponent of a numerical majority, represents various and conflicting interests and all the different orders of society. It is therefore not so much a single power as a combination of various powers to constitute a whole, and has within itself a system of checks and balances which make up for the want of restraint from without.<sup>1</sup> If a single and uneducated class should at any future period predominate, and, ignoring the traditions by which Parliament has so long been influenced, decide every question as it arises according to the passions and impulses of the hour, the want of the restraining influ-

<sup>1</sup> This can hardly be said of the House of Commons as at present constituted; and the capacity of a popularly elected assembly for government is now fairly under trial for the first time in political history, and will be tested by its results in England and France.

ence of a written Constitution may be severely felt, and the people of the United States have an additional reason for adhering to the method chosen by their forefathers.

It is proper to observe that if written guaranties are needed against popular error or the violence of parties, we should sedulously maintain the constitutional supremacy of the General Government. But for this check the people of a State would, when duly assembled in convention, have the legal omnipotence of Parliament, with a consciousness of physical and numerical superiority which must be wanting in an assembly not chosen by universal suffrage, and where various classes are represented and restrain each other. Such a convention is an absolute democracy, acting without check of law, which might, and if the theory of secession is sound may, sweep away all the safeguards that protect the life and property of the citizen, or alter the form of government by placing despotic power in the hands of one or of many persons. In Pennsylvania it is not necessary to go through the ceremony of assembling a convention. A resolution adopted by two successive legislatures and ratified by the people, may, if the Constitution of the United States does not forbid, subvert the independence of the executive or judiciary, take the land of A and bestow it on B, or inflict capital punishment on an individual without a hearing. Such instances were not infrequent during the Confederation, and were among the causes which led to the adoption of the Constitution of the United States.<sup>1</sup> Although the prohibitory clauses of that instrument were limited to certain points, they still put a salutary check on the States; and the Fourteenth Amendment gave an additional safeguard of the highest value by making the time-honored provision of Magna Charta, — that no man shall be deprived of life, liberty, or property save by due process of law, — a restraint on State legislation. But for the prohibition of laws impairing the obligation of contracts, good faith would have been repeatedly and grossly violated under the cover of State legislation; and the re-

<sup>1</sup> See Governor Randolph's Speech in the Virginia Convention, 3 Elliott's Debates (2d ed., Phila., 1876), 66.

straints imposed by the Constitutions of the several States might be too weak in many other particulars if the Constitution of the United States did not add its guaranty. No such measure as that by which the Irish tenants were recently converted into owners at the expense of the landlords, and which will in all probability be a precedent for similar legislation in Great Britain, is therefore practicable on this side of the Atlantic without obtaining the assent of three fourths of all the States to an abrogation of the clauses in the Federal Constitution which protect the right of property, and place it on a basis that cannot be shaken by a merely popular vote.<sup>1</sup>

<sup>1</sup> The course of events in France would seem to indicate that a democracy such as France is, and England may before long become, is unsuited to parliamentary government, and requires the restraint of a written Constitution; and this seems to be the opinion of Goldwin Smith, as given in an able article in the *Contemporary Review* for March, 1885 (*ante*, p. 178).

## LECTURE XIV.

The English Constitution (*concluded*).— The Executive chosen in England by the House of Commons. — Incompetency and Failure of the Electoral College in the United States. — Their Place filled by Irresponsible Conventions which nominate, and in the Majority of Instances practically elect. — Patronage a Controlling Influence in the United States, as it was formerly in England. — The Primary Elections, which determine who shall be Candidates, not regulated by or known to the Law, and not attended by the Great Body of the Citizens. — The Caucus and its Effects. — Civil Service Reform in England and America.

It results from the above sketch of the practical working of the English Constitution that a principal, and perhaps the most important, function of the House of Commons is elective, — to designate the persons who are to fill the executive department of the government and exercise the powers which the Constitution of the United States confers on the President. This is not effected by a formal vote. Certain men come to the front and are recognized as having the ability or influence to act as leaders, and when a crisis occurs they must be taken, because they are the only persons who can control the House of Commons. A result has thus been fortuitously attained which the framers of our government sought to produce by means which have proved conspicuously inadequate. They knew that a numerous and popular constituency may have a common purpose, but cannot, save in rare and exceptional instances, form a deliberate judgment as to the means by which its will can be carried into effect, or the persons who are best fitted to execute it. As the people must legislate through representatives, and interpret the law through judges, so they should not act personally and directly in choosing a chief magistrate. If such a power is conferred, it will slip from the popular grasp and

be used by demagogues for selfish and ambitious purposes. The Convention sought to overcome the difficulty by an ingenious expedient. The people of the United States could not reasonably be expected to fix on a man having the gravity, dignity, and matured experience requisite for a President of the United States. Such qualities raise their possessor above the common level, and tend to segregate him from his fellows. Moreover, the inhabitants of the various sections would have their local preferences, and could not readily confer together or unite upon the candidate best fitted for such an exalted post. It seems, however, to have been taken for granted that if the masses were incompetent for such a task, the several States would have no difficulty in selecting men in whose wisdom they could confide, and who would exercise a sincere and unbiassed judgment. The soundest statesmen, the best-read lawyers, the most experienced men of business, would be chosen as electors, and would, after mature deliberation in their respective colleges, fix on some individual whom public opinion could not but approve as worthy of the first place in the Republic. This elaborate contrivance is, as you are well aware, frustrated by pledging the electors to vote for the candidate of the party to which they belong, and which uses them as its instruments. So entirely is this the paramount, though unwritten law, that if they were to exercise their judgment in accordance with the letter and spirit of the Constitution, the act would be universally regarded as an outrage, and might lead to civil war. Usage has thus, in less than a century, abrogated an organic statute which was intended to be an integral part of the framework of the government, and insusceptible of change except through a constitutional amendment.

The assemblies to which the choice of a President properly belongs having thus virtually ceased to exercise their powers, these devolve on the politicians on either side, who meet in convention and designate the persons among whom the American people must select a chief magistrate. The limitation is as real as if it were written in the Constitution, because the citizen who gives his suffrage to any other candi-

date virtually throws away his vote, and might as well absent himself from the polls. This practical repeal of the constitutional provision would be of less moment if the nominating conventions represented the community as a whole, or were chosen in a way prescribed and regulated by law ; but they are self-constituted bodies, which the State does not recognize and cannot therefore regulate. There are two elections, — one to select the candidates, the other to determine which of them shall prevail ; and while elaborate precautions are taken to protect the latter against force and fraud, the former has no such safeguards. There are no means of excluding a fraudulent or illegitimate vote, nor any appeal to an unbiassed tribunal if it is admitted. No one can exercise the right of suffrage at the primary elections without being registered as a party man, and they only have a controlling influence who are partisans. The successful merchant, the substantial tradesman, and the industrious artisan stand aloof, and their place is filled by adventurers who make a trade of politics, with a view not so much to the honors of public life as to its gains. Hence it happens that the American people are governed for many purposes, and especially as it regards the choice of the men who fill the halls of legislation and administer the executive departments of the government, by an oligarchy whose merit does not compensate for their numerical insignificance. I have asked in mixed assemblages whether any one present had taken part in the choice of the delegates to a Presidential convention, without receiving an affirmative reply, and I am convinced that such persons are so few in number as to be out of all proportion to the community which they affect to represent. They have, moreover, in general no will of their own, and are simply the tools of a still smaller body of tacticians who touch the springs and control the movements of the whole machine. There are, I believe, some four or five hundred persons in either party who could, if they agreed, determine who should be its candidate, and thus virtually compel the citizens to vote for him, or suffer the election to go by default in favor of some one who is politically more offensive, and personally not less obnoxious.

It is not difficult to understand why the electoral colleges have sunk so much below the level of the duty intrusted to them by the Constitution. They are ephemeral bodies, called into existence for the performance of a single function, and ceasing as soon as it is fulfilled ; and they do not individually or collectively possess the weight and dignity to resist pressure from without and exercise an independent judgment in such a choice as that of a President of the United States.

Far different is the position of Parliament. It is an assembly venerable from its antiquity ; and as the repository and safeguard of English liberty, which proceeds according to known rules, precedents, and traditions, and is the source from which we, in common with all civilized nations, have derived our conception of liberal institutions and constitutional law. Consisting for the greater part of men distinguished for birth, wealth, or attainments, who do not depend for their social position on their seats as legislators, it does not meet for a day and then dissolve, but has continuing and important duties to fulfil, — to regulate the finances, to amend the civil and criminal jurisprudence, to review the foreign and domestic policy of the government, and to change it, if need be, by a vote of want of confidence. The contests to which such questions give rise call forth the best abilities on either side ; the great parties which divide the House learn who is sagacious in counsel and eloquent in debate, and are not likely to select chiefs who will lead them to defeat. The English premier must therefore not only be one who can think clearly and express his ideas in appropriate language, but he must also have the commanding ability to silence opposition and take the lead in a struggle where force of character is not less essential than eloquence. An author who is not more remarkable for the eccentricity of his style than for his entire disregard of justice, has spoken contemptuously of the rule of able speakers, and expressed his preference for the heroism which makes a successful appeal to force. If Mr. Carlyle's view is correct, Mahomet, Frederick the Great, and Napoleon deserve better of mankind and

have a higher claim to reverence than Demosthenes, Chatham, the younger Pitt, or Daniel Webster. A government of rhetoricians is certainly not desirable; but such men do not easily attain a first place in an assembly which meets for the transaction of business and is as eminently practical as the English Parliament, and true eloquence is generally associated with the qualities which should meet in one who seeks to rule his fellows.

There is another and still more important difference. An American President, once chosen, is secure of his office for four years, and whatever may be his blunders or inefficiency, can be removed only by an impeachment; while Parliament not only selects the ministry, but can change it whenever it thinks proper. The cabinet is constantly on trial,—the motion which fails to-day may be renewed to-morrow; and if the force of circumstances raises an incompetent man to power, he will be removed as soon as his unfitness becomes manifest. He stands in the fore-front of the debate, exposed to the shafts of argument, invective, and ridicule; and his party will not readily select a leader whose failure would involve their own. The President is put to no such proof. The only communication between him and Congress is through a formal written inquiry, and no less formal reply; his messages need not come from his own pen; and as the cardinals have been said to look for weak lungs and impaired digestion in making choice of a Pope, so the politicians who are intriguing for the Presidency may think that their interests will be promoted by the nomination of a second-rate man, whose talents will not command a second term.

In the study of institutions we must consider their actual working as well as the theory on which they are based; and the neglect of this precaution may lead to conclusions which are essentially false. Where a government has endured for any length of time, some branch of a more vigorous growth generally supplants or overshadows the rest. Thus we have seen that although the outward forms of the English Constitution are unchanged, the House of Commons has become the controlling power of the State. So the electoral colleges

of the United States have dwindled into an unmeaning show ; while the caucus, in its various forms of the primary election and the nominating convention, has acquired an all-pervading influence which the founders of the Republic certainly did not anticipate. It has accordingly been said with much truth that all governments must perish unless they are periodically brought back to their first principles. . In applying this maxim it is nevertheless requisite to consider whether the deviation which we are attempting to correct is a natural growth, or one of those excrescences which deform, and may ultimately destroy, the plant. He would be an erring reformer who would put the Crown in England where it stood in the reign of Elizabeth or James I. It were well if as much could be said for the oligarchic conventions that have engrossed so large a share of power in the United States, and would be attended with still greater evil if they were not held in check by the small body of independent voters who persist in thinking for themselves, and when the ticket is exceptionally bad, stand aside or vote for the candidate of the opposite party.

The election of the chief magistrate is not the only point in which the working of our institutions has falsified the expectations of the men by whom they were founded. Unhappily the malady is not confined to a single branch, but threatens the entire system. The political decadence of our government is a constant theme of complaint in private assemblies and the public press, and is the more remarkable because the social result is in many respects fortunate. The mass of the people of the United States are humane and intelligent, and not less honest than an average German, Englishman, or Frenchman, and there are few countries where education is so generally diffused. If property is rapidly accumulated in the great commercial centres, it is as rapidly distributed under the operation of equal laws of inheritance ; and a large proportion of the population enjoys the moderate competence which places its possessor beyond the temptations alike of poverty and riches, and is favorable to the development of the qualities that are essential to self-government. It is

accordingly generally conceded that the American people displayed more than ordinary sagacity, firmness, and moderation in dealing with secession, not only while the conflict lasted, but at its close. Unfortunately, while the nation has risen in some respects to a higher level, its public men have declined in a more than equal ratio, and will not, with some creditable exceptions, bear comparison with the framers of the Constitution or the leaders in council and debate during the opening years of this century. Many causes have been assigned for a result which is so disheartening to republicans, and among them that the American is too much bent on pecuniary success to care for the commonwealth, and suffers questions of the highest moment to go by default. This accusation seems to me thoroughly unfounded. In no part of the world do men respond with more alacrity to their country's voice, whether it summons them to the field or to the performance of a civil duty. No slackness was found on either side during the late civil war, and there are few who absent themselves from the frequent elections which are held under the auspices of the Federal and State governments. If further proof is needed, we may point to the hospitals, public trusts, and the numerous other institutions of private charity or general usefulness which are superintended by men who withdraw from business and labor gratuitously for the common good. It is not, therefore, from a lack of public spirit that the primary elections, on which all else depends, are shunned by the best and most patriotic citizens; and we must look elsewhere for the explanation of a fact which all good men deplore.

One cause unquestionably is, as I have elsewhere stated, that these assemblages are in fact caucuses, which the law does not recognize and cannot regulate, and that if a voter is overawed or excluded from the polls, or a certificate fraudulently given to a delegate who did not receive a majority of the suffrages, the only mode of redress is an appeal to an irresponsible committee, which may sympathize with the persons who contrived the wrong. Moreover, the party rules are so worded as to exclude every one who did not vote the

entire ticket at the last election and will not promise to be faithful at the next; and as there are many persons who cannot conscientiously give a pledge which would limit their freedom of choice, and may compel them to support an unworthy candidate, the effect is to disfranchise a large number of the men whose attendance it would be most desirable to secure.<sup>1</sup>

<sup>1</sup> The following extract from Harper's Weekly of March 6, 1880, shows how the political machine is worked in our cities, and that the effect is to disfranchise the great body of the citizens:—

"There is one docile political personage who is generally overlooked and contemned, but who is a very important part of every election. We mean the individual voter. He is not a holder of office, nor a seeker of office; he is merely an intelligent private citizen whose business prevents him from giving his exclusive attention to politics, but who wishes to do what he can to secure an honest, economical, and patriotic administration of affairs. He reads in his newspaper that the only way in which he can 'make himself felt' is to begin at the beginning and attend the primary meeting. But the city newspaper which gives this advice is either delightfully innocent or a mocker. The voter is told that if he neglects the primary meeting and fails to vote at it, he has no right to complain of the action of those who do, and that he has only himself to blame if nominations are made and policies adopted which he does not approve. We should like to ask the intelligent and comfortable city voter who is reading these lines how often he attends a primary meeting, or knows when one is held, and whether the reason that he does not go, is not the feeling that it would be of no use. But whether he thinks of it at all or not, we can inform him that his suspicion is correct, and that it would be of no use. When his newspaper urges him to go to the primary meeting, or acquiesce in its action without grumbling, it exhorts him to do what it ought to know that he cannot do. He is disfranchised, and cannot vote at the primary, even if he should demand the privilege. He has no voice in the initiation of political action, and all he can do is to ratify or to refuse to ratify the 'job put up' by others.

"This is an interesting fact for the important personage of whom we have spoken, the individual voter, who, although he does not make politics his business, has the power to give success or defeat to political parties. Until he recognizes this fact, he is a mere pawn and counter in the hands of professional politicians, who play their game by the baldest bribery of patronage or open corruption. The election in the State of New York is generally decided by the result in the city; and that is arranged upon both sides by politicians who treat the respectable voting reader of these lines as the overseers of plantations in the ante-bellum days treated their slaves. 'Go to the primaries, or take the consequences,' shout the newspapers. But let the voter see whether he can go to the primaries. The system is essentially the same in both parties. The Republicans borrowed it from Tammany Hall. It divides the city into district associations, and authorizes every voter to become a member of the association in the district of his residence, and of that association only. The conditions of

If these were the only difficulties, the practical good sense of the American people would perhaps supply a remedy; but there is a malign influence, resulting from the vicious system under which every public servant is removable at pleasure and will inevitably be dismissed unless he not only does the party bidding, but upholds the patron to whom he owes his place. There are, it has been authentically stated, more than two hundred thousand offices, State, municipal, and federal, held by a slavish tenure which compels the incumbent to

admission are, proposition by responsible members, a favorable report from a committee, and a pledge to sustain the 'regular' action of the party. This scheme of course excludes from membership, and consequently from the right of voting at the primaries, every man who is objectionable to the rulers of the association, because nothing is easier than to 'hang up' an obnoxious name in the committee, while self-respecting men are very slow to pledge themselves in advance to support 'regular' action, without regard to its honesty or expediency. The result of the system upon the Republican side is this, that of more than 58,000 voters in the city, no more than 6,000 or 8,000, at the most, are members of the association. More than 50,000 of the 58,000 Republican voters who are exhorted to go to the primaries could not vote if they went. The exhortation is a mere mockery in such a community as a great city, however wise it may be in a small rural neighborhood. The facts have been long familiar to those who are interested; but a letter from Mr. George Bliss, published last November, gave a clear insight into the subject to all who had no knowledge.

"Three or four years ago the 'Easy Chair' in Harper's Monthly described the attempt of a good citizen — one of the individual voters who could not devote all his time to politics — to take part in a primary meeting. It was in another city, indeed, and he took part, — but very much as a leaf takes part in the flowing of a river. Mr. F. W. Whitridge, in the current number of the International Review, relates his experience and that of a friend in New York; and his story is well worth the attention of those who exhort attendance upon primaries as the panacea of our political ills. Mr. Whitridge and his friend went to the primary, as per exhortation. There was a man in the room at a table, and a few other men were lounging about. Others came in and, after saying something to the man at the table, went out again. The two individual voters waited patiently for the meeting to be organized, in order to 'make themselves felt.' But at the end of an hour they were informed that the primary was in progress; that the gentlemen who had come in had voted; that a ticket which was shown to them was going to be elected, although votes, of course, could be cast for any one else; and finally, that only members of the association could vote. This is the way in which the immense New York city delegation to a State convention, which can usually decide the action of a convention, is selected; and this is the exact measure of the value of the exhortation to individual voters to go to the primaries or to hold their tongues. It shows — and it is but one part of the evidence — how far the machinery of politics has eaten

obey his political taskmasters at the risk of being deprived of the means by which he gains his bread. If he is not required to make bricks without straw, he must at least furnish the straw from his own bed, which may be a scanty one, or, in plain English, devote no inconsiderable portion of a salary, which presumably is not too large to procure faithful and efficient service, to a fund which is employed in maintaining the party organization, and not infrequently for factional and personal ends.<sup>1</sup>

out the principle of popular institutions, and how absolute is the despotism of professional politicians; that is, of men who make a business of packing caucuses and conventions in order to force upon the voter, who cannot give all his time to such business, the alternative of supporting whatever they propose, or of practically helping the other party. But the individual voter, if he chooses to assert himself, is still the important personage. It is true that he cannot give all his time to politics, and that he cannot cope with the professional politician at the primary; but he can vote against him at the polls, and teach him, in the only way in which he can be taught, that he cannot count upon a great party as upon a flock of sheep. There is a deep and rapidly growing disgust and indignation with this inexorable despotism. This feeling gave a tremendous note of warning at the last election in New York. It is felt by those who do not choose to advertise their opposition, but who know how to 'make themselves felt' at the polls, if they cannot do so at the primaries. It is idle and worse to represent such an abuse of organization as in itself a necessary organization. It is made possible only by the patronage of office. While that patronage is open to such abuse, the despotism can be checked only by the quiet independence of the individual voter. But it can be completely overthrown only by the awakening of public opinion to the destruction of the vast bribery fund of patronage."

<sup>1</sup> This practice has gone to such an extent that even when the appointment and supervision of the police are intrusted to a mixed commission, composed of the politicians from either side, they are fleeced by both parties, and the money used to carry on an internecine contest, if indeed it does not adhere to the palms or fill the pockets of the men who have extorted it. An editorial in the Philadelphia Ledger of Oct. 4, 1880, tells the story in the following words:—

"The policeman's lot in New York is certainly not a happy one. The department being nominally non-political and under the control of a board composed of representatives of both parties, political assessments are forbidden. But the demands for money—'for legitimate expenses,' of course—have been so great that the two parties have united to evade the rules; and the unhappy policeman is doubly assessed. As some of the New York papers point out, 'honors will be easy'—except to the policemen—if both parties collect their assessments; but each expects, no doubt, to get a little advantage of the other. It is a disgraceful business, and the more reprehensible because it is reasonably

It should also be remembered that for every man who is actually in place there are three or four aspirants, one at least in his own party, and two or more on the other side, who all expect to succeed him when removed, and are ready instruments in the hands of a politician who will consent to promote their views.

The natural result of such a system is a swarm of political adventurers, who, though serving under different chiefs, are always prepared to unite against any citizens whose chief desire is to promote the public good, and whom they consequently regard as an intruder on a domain which they desire to control for their own purposes. The affiliation is sometimes open and avowed, sometimes concealed under a decent veil; and we accordingly read of clubs serving under the names of aspirants for office, of a mysterious band whose pilgrimage assuredly was not to the Holy Land,<sup>1</sup> of Tammany, Irving Hall, and the other notorious brotherhoods which have been used as instruments by such master-spirits as Sweeney, Tweed, and Kelly. It is not surprising that such a force should in the long run prove irresistible, and engross the entire field of politics. Reform associations may be constituted, and partial successes be obtained here and there; but an army of regulars will always prevail against a militia, however high spirited and patriotic, and at the close of each succeeding year party government is found to have become more entirely a machine. The evil has grown to such a height that the meeting of our legislative assemblies is viewed with apprehension, and their adjournment hailed with delight; and the State Constitutional Convention which sat in Philadelphia in 1874, after lessening the evil by taking every power from the legislature that was not indispensable, applied a palliative by providing that the sessions should be biennial; and a similar proposition has been made with regard to Congress.

certain that the money thus collected will be used, not for 'legitimate expenses,' which are comparatively small, but to further schemes that are very far removed from legitimate operations."

<sup>1</sup> The "Mysterious Pilgrims," a political club generally believed to have been established by the politicians of both parties for the attainment of private ends through public means.

That such restrictions should be needed, shows how much we have sunk below our proper level. Where no grave disorder afflicts the State, the legislature may be trusted to give the law to the other departments of the government, and provide for each contingency as it arises. Such is the case in England, where Parliament exercises an authority which would be arbitrary but for a self-imposed restraint. If Congress or the State legislatures were thus absolute, no vested right would be secure, and every man who had anything to lose would have to be constantly on the watch against the undue influence in which, as it is generally believed, so many of our laws originate. No one who is conversant with the political history of the last fifty years will think this picture overcharged, and I might appeal for its reality to the conventions which have been successively engaged in devising elaborate precautions against ignorant and corrupt legislation.

I do not know that any one remedy will suffice to heal a disorder which is so profound and of such long standing; but the nearest approach to a radical cure would be found in making the tenure of office during good behavior. Human nature is everywhere much the same; the differences arise from the influences to which men are subjected: and a people who are systematically led into temptation will scarcely remain in the straight and narrow path. As our government is now administered, office is a powerful magnet, which draws all the baser passions into political life, and repels high-toned and patriotic feeling. The "ins" are swayed by their fears, the "outs" by their hopes, and both are apt tools in the hands of ambition and intrigue. It is not surprising that men who do not disdain to use such levers distance their more scrupulous competitors, nor even that a veteran politician should monopolize a State and transmit it as a family possession. A change in the tenure of office would correct this evil, or reduce it to proportions that would be no longer dangerous. The office-holder is naturally the most cautious of mankind; and if he knows that he is secure in a close adherence to his public duties, will not go beyond them. If the much-talked-of reform in the civil service were thoroughly accomplished,

it would be superfluous to forbid the officers of the Federal Government to mix in politics. It was because the men who had been appointed by a Republican administration believed that nothing would save them if the Democrats came into power, that Mr. Hayes's command was inefficacious, and might indeed be reasonably objected to as putting the manipulators of one party in bonds, and leaving those on the other side free to employ their usual tactics.

It is, I think, an inevitable inference from the considerations above stated that if the government were conducted on the principles which prevail in private life, and the public servants retained so long as they performed their duty, the office-holder would withdraw altogether from politics, or cease to be a controlling element. Nor is this all; not only would the actual occupants be free to vote as conscience dictated, but the Commonwealth would be delivered from the swarm of aspirants whose hopes are centred on the places that are already filled. It has been said with too much truth that for every man who enjoys the sweets of office there are half a dozen striving for his seat, and who do the bidding of some political patron in the hope that his influence will facilitate the accomplishment of their desire. Such expectations, like lottery-tickets, are apt to prove fallacious, but have not on that account a less powerful hold on the imagination of mankind.

There is another injurious consequence. The offices in the gift of the General Government are regarded as so much current coin which may be earned by party services, and which no politician can justly withhold from workers who have labored for his nomination or to secure his success at the polls. The members of both Houses are consequently beset with applications for office, and in their turn bring a pressure to bear on the President which, in connection with that exercised from other quarters, leaves him but little time for the appropriate duties of government. The demand is not simply that he shall fill vacancies, but that he shall make vacancies by dismissals for opinion's sake, without regard to character or fitness, which will be a cause of suffering to many thousand deserving per-

sons; and having a heart and conscience, he must feel the strain. It is more than ordinarily great when a party which has been long excluded from power elects a President who finds all the offices filled with men of opposite political views, and is required to make a wholesale sweep in order to reward his own adherents. The situation is the more trying because rival politicians not infrequently claim the right to control the appointments throughout a State or city; and whichever way the President turns, he will make an enemy. It was owing to such a cause that a brilliant senator, who would have shone as a statesman had he not devoted the abilities that were meant for his country and mankind to practical politics, resigned his seat in the Senate, denounced the administration, and demanded that the legislature should re-elect him as a rebuke to Mr. Garfield for having exercised the power of appointment in New York without consulting him and acting as he dictated. The result was his defeat and the disorganization of the party which it was the professed object to serve; and the assassination of the President followed as an indirect and lamentable consequence.<sup>1</sup>

<sup>1</sup> The following extract from Harper's Weekly of Feb. 18, 1887, gives a vivid but not overdrawn picture of an abuse that has no parallel in any other government, and tended in different ways to shorten the life of Harrison, of Taylor, and of Garfield:—

SQUEDUNK AND THE COUNTRY. — One of the strongest arguments for reform in the civil service is the necessity for securing time for the President to attend to the important duties of his office which do not concern appointments and removals. General Cox, of Ohio, described in the *North American Review*, nearly twenty years ago, the complete absorption of the time of a member of the cabinet by the importunity of office-seekers. President Harrison died of it. President Lincoln made humorous and memorable protests against it. Josiah Quincy, seventy years ago, drew a vivid picture of the business even at a time when the civil service was comparatively very small in numbers. Sam Swartwout has left a characteristic account of the struggle in the first weeks of the Jackson administration, even before the floodgates had been burst open by the fierce pressure for spoils. But with the vast increase of the civil service the assaults of office-seekers almost consume the President's time. From morning until midnight the stream is incessant. Deputation after deputation, representing all sides of the great struggle for the post-office at Squedunk, file in and harangue him. In vain he tells them that their words go in at one ear and come out of the other, that he shall not remember for ten minutes the facts and allegations with which they have overwhelmed him, and that the public

Removal from office in order to fill the vacancy with personal or political adherents is a practice unknown to the better days of the Republic, and of comparatively recent growth, and

feeling of Squedunk is so aroused and exasperated that its pacification plainly requires him to find a candidate who has not yet been named.

In vain he appoints certain days and hours for the purpose of hearing all the Squedunk delegations and agents and friends and backers in the country. Senators and representatives, with sovereign disregard of all notices and warnings, insist upon presenting their constituents from Squedunk who cannot remain in Washington, but must return at once, and consequently must see the President immediately. The pressure is overpowering. If the President remits every demand to the head of the department to which it belongs, the senator or representative reminds him that the gentlemen from Squedunk will return with a sense of outrage which will be expressed in a manner most injurious to the party. If the President persists, the senator or representative is personally humiliated that his constituents should behold his want of "infloocene," and he raises his eloquent voice in the Capitol, demanding to know whether the grand old party (Codling or anti-Codling, as the case may be) is so destitute of men capable of serving the government that rascally Codlingites (or anti-Codlingites) must be retained in place. Upon what days, he asks, have we fallen? What cuckoo is this in the robin's nest? Oh, for an hour of Jackson, or for the chance of D. B. Hill! The President, meanwhile, having seen the last of the Squedunkers for the day, utterly exhausted turns with a weary brain to consider the grave questions which await his attention, but which Squedunk has left him hardly time or ability properly to consider.

The absurdity of this business, the perfectly useless strain upon the President, the absolute impossibility of transacting properly this part of his functions in any such way as this, and of discharging justly the graver parts of his duty, are apparent to the common-sense of the country. The civil-service law is the beginning of relief. It deprives the executive of no constitutional function. It interferes with no lawful obligation. It merely provides a form of subordinate executive action. It derives all its efficiency from the President. He approves the rules, and modifies them at his pleasure. Beyond that, the law which creates an office can provide for filling it. It is a law of Congress which makes post-offices presidential. The law may vest the appointment of "inferior officers" in the President, the courts of law, or the heads of departments; but it may also prescribe conditions. No constitutional provision is traversed by the reform law. But it does not relieve the President himself, because it applies only to places to which he does not appoint. It is, however, the beginning of relief, because it shows the awakening of the public mind. The measure that would relieve the President would be the repeal of the four years' law, which makes vacancies for him to fill, and invites the overwhelming pressure and the utter absorption of his time which we have described. If the deputations from Squedunk were compelled to submit good reasons for removing a public officer, instead of urging a candidate to fill a vacant office, their task would be very much more serious, and their visits would become fewer and farther between. It is a contest between the country and Squedunk.

was originally vindicated on the ground that when a party succeeds to power there should be a change of men as well as of measures, and that the incoming administration cannot safely rely on the officers who were appointed by their predecessors. This pretence has long since been laid aside; and it is now generally understood that one who aids in securing the nomination of a President, Governor, or Senator, may demand a place, although none is vacant, and his desire cannot be gratified without turning out some public servant who has been equally faithful to his party, but does not happen to have a friend at court. If the doctrine that to the victors belong the spoils was mischievous as originally promulgated, it is far more demoralizing now, when, as Mr. Marcy bitterly observed, every political *condottiere* thinks himself entitled to despoil the camp of his own party if there are no other means of rewarding his immediate partisans. Such a system has an inevitable and increasing tendency to faction and cabal, and is not less prejudicial to party success and discipline than to the welfare of the community at large. The results are at once ludicrous and sad. The first qualification for the appointment of a letter-carrier or custom-house officer is that he shall be able to carry his precinct. If he can, he is sure of recommendation from a member of Congress or State senator who wants his service as a delegate. If he cannot, the postmaster or collector who ventures to appoint him will be subjected to a pressure which few men can resist, or perhaps be summarily ejected. The chief of a bureau is not infrequently placed in a painful dilemma by a struggle between two rival politicians for the presidency or governorship, in which each insists that his partisans shall be appointed. If he favors A, and B has the ear of the existing administration, he will be dismissed forthwith; if he does not, and A is elected, his official life will be brief. Such dramas are frequently enacted in the great political centres, and more than one has taken place in New York and Philadelphia during the last few years.<sup>1</sup>

<sup>1</sup> See the Philadelphia Evening Telegraph of June 11, 1880, for an instance of the pressure which a Secretary of the Treasury may exert through the custom house to procure his nomination to the presidency.

If the axe were laid to the root of the evil by rendering the tenure of office permanent, politics would cease to be a trade, because they would no longer afford a hope of profit. There would be few vacancies, save through death or resignation; and when one occurred, promotion would take place, as it does in the army and navy, in the order of seniority or for meritorious services. The avenues to public life would no longer be closed to men who are averse to the arts of faction and intrigue, and the way would lie open for the noblest career that can engage or elevate the mind.<sup>1</sup>

There are some who affect to treat such a reform as a visionary project, a counsel of perfection which might be well enough in Utopia, but is impracticable as political society is now constituted. It is a sufficient answer to this objection that the principle for which I am contending has been established in England by the force of public opinion, and with the results which the best men anticipate from it here.<sup>2</sup> An Eng-

<sup>1</sup> This lecture was written and delivered in 1879, while most persons regarded civil-service reform as visionary and impracticable. Since then it has been introduced into the custom-house, the principal post-offices, and the departments at Washington, where the subordinate officers and clerks are chosen by competitive examination, and may ordinarily vote as their conscience dictates, without the risk of dismissal. The persons thus emancipated are, however, the smaller part of the great body of federal office-holders; and although New York has followed the example of the General Government, the demoralizing doctrine that office should be the reward of personal and party services is still adhered to in Pennsylvania, and generally throughout the Union, even as it regards the choice of clerks and policemen. I have therefore allowed the above passages to stand, as giving some idea of a system which is still mischievous and prevalent.

<sup>2</sup> "On reflection, it will excite no surprise that British experience is presented as richer, riper, and more varied, as well as vastly more extensive, than that of the United States. It is such not merely because England had gathered the administrative wisdom of many centuries before the American nation was born. Eliot and Vane, Chatham and Burke, had so lived and spoken that the greatest reformers may even yet gather inspiration and wisdom from their examples. Statutes have been enacted, in the interest of pure and vigorous administration, to the moral level of which none of our own enactments have yet risen, and without which our courts could not sustain their most salutary rulings. We must also

lish minister who should dismiss a public servant on party or personal grounds would lose his self-respect and the confidence of his fellow-countrymen. When Lord Beaconsfield was charged with having made an appointment which, though entirely respectable, was alleged to have been prompted by the wish to serve a political friend, no voice was raised in his behalf in the House of Commons, and he could hardly have withstood the attack had he not shown in a masterly speech in the House of Lords that he had called on the different departments for a list of the most meritorious candidates, and chosen him who best deserved the place. A change of administration may necessitate the resignation of some thirty or forty persons, who are members of the Cabinet or the political chiefs of the various departments; but the other offices are filled precisely as they were before.

The reform of the English civil service is the more remarkable because it took place while the privileged classes held the avenues to office, and is a remarkable instance of the surrender of patronage by a dominant party, which should be followed in the United States. The measure met with an adverse reception in official circles and the House of Commons

remember that Great Britain has ruled over so many millions of people, over countries so diverse and races so different, and that she has held such supremacy in commerce in all quarters of the globe, that every kind of official authority has been exercised upon a scale with which, in many particulars, nothing analogous in our affairs is comparable. To rule British India alone, with its vast public works, its great army of more than 250,000 men, its 200,000 policemen, its revenues of \$250,000,000 a year, its population of more than 190,000,000, of many races and creeds, at once difficult to govern and dangerous to neglect—even for a single year—requires more officials, more responsibility, more efficient methods of administration, and I may almost add more care and capacity, than would have sufficed for good administration in all our Territories and Indian affairs during this generation. When to India we add the Australian colonies, Tasmania and South Africa, Canada and Jamaica, Ceylon and the many islands and stations under the British flag all around the globe, there is presented a variety of official life and opportunities for corruption under a bad system such as never before, in ancient or modern times, taxed the administrative wisdom of a nation.”—*Dorman B. Eaton, Civil Service in Great Britain*, p. 11.

(where a resolution in its favor was lost by fifteen votes), and succeeded only through the force of public opinion, which is its sole reliance here. It could scarcely have been carried through Parliament, and would have failed but for a dexterous use of the prerogative by Lord Palmerston, who as the executive head of the government obtained an Order in Council making a preliminary examination requisite to appointment to office. The principle that merit should be tested, and have a fair field, obtained a hold on the popular mind which could not be disregarded, and Parliament soon afterwards applied it in all the departments of the civil service.<sup>1</sup>

The marked improvement that has occurred during this century in the tone of English politics has not been attended with a corresponding amelioration here, and our public men have sunk as much below the level of Washington and Hamilton as theirs have risen above that of Sir Robert Walpole. The patronage incident to official position is now justly regarded in England as a trust; and it is felt that one who uses it for his private ends is as little worthy of confidence as a cashier who speculates with the money of the bank. These truths were axiomatic to the men who devised the American Constitution; and when they are again recognized and acted on, we may hope that politics will cease to be a scene of intrigue, and become the chosen pursuit of the wise and good.

The argument for civil-service reform is sometimes met by an allegation that the men who fill the various offices are on the whole diligent and faithful, and will not lose by a comparison with the same class in any other country. This is one of those half truths which contain the most dangerous fallacies. The advocates for reform do not deny that much excellent service is rendered in the mint, the custom-house and post-office, nor that when the whiskey ring is held in check, the internal revenue is punctually collected and paid into the Treasury. What we need is not so much good faith and efficiency — although some of the departments, and notably the Indian Bureau, admit of improvement in these respects — as

<sup>1</sup> Civil Service in Great Britain, chapters xvi., xix.

that our public servants shall regain their birthright as American citizens, and cease to be the tools of the professional politicians. If we wish to preserve our freedom, we must enfranchise our political serfs and leave them free to think and vote as conscience dictates. Servitude is not necessarily a constraint applied through gyves or lashes, but may result from a moral duress or undue influence which the mind has not the strength or virtue to resist; and it is as true now as it was in the time of Lord Chatham, that men who have lost their independence are fit instruments for enslaving their fellow-citizens. A new abolition society should be formed for the emancipation of the office-holders, whose condition is as much lower than was that of a negro on a well-conducted Southern plantation as slavery of the mind is worse than that of the body.

The substitution of a tenure during good behavior for the present precarious occupancy would, as I have already shown, instead of creating a bureaucracy, as some apprehend, have an opposite effect, by disbanding the array of office-holders and office-seekers who now so largely influence the nominating conventions, and through them the government.

If it is asked how the needful change can be effected, the answer is, by a law providing that office shall be held so long as the incumbent behaves himself well; that promotion shall take place according to seniority or for meritorious service; that no removal shall take place save for some ground definitely assigned in writing by the chief of the bureau or department, and duly filed with a certificate under his hand that it is the veritable and only cause for the act; and that to remove any one, wilfully and maliciously, without reasonable and probable cause, shall on trial and conviction disqualify the guilty party from acting as a public servant; and finally by a method of competitive examination which will open the way for the graduates of the public schools, and put an end to the political favoritism which is the bane of our government as it is now conducted.<sup>1</sup>

<sup>1</sup> See Civil Service in Great Britain, by Dorman B. Eaton (to whom the country is largely indebted for his untiring efforts for the reform of the gross abuses of our civil service), pp. 4, 7, 9.

It is no part of my purpose in delivering this lecture to conceal the ills that afflict the Republic, nor my apprehensions that they will prove mortal if unchecked. If truth is due in any quarter, it is to our country, and when treating of the dangers that menace her existence. But I do not mean to intimate that the case is hopeless, and have laid the naked facts before you as an incentive to exertion, and not as a reason for despair. There is much in the experience of the past to encourage hope. Corruption is not more rife in our legislative assemblies than it was in Parliament when Sir Robert Walpole could declare from his own knowledge and of no inconsiderable portion of his opponents, "all these men have their price," or when George III. contributed £6,000 from his private purse for the purchase of votes;<sup>1</sup> and the abuse of patronage was not less familiar to Newcastle, to Bute, and to North than it is to an American politician of the present day. The change that has been wrought in these respects in England during the last ninety years is an assurance that a like purification may be accomplished here. It is not a slight matter that the Convention which renominated General Grant in 1872 thought it for their interest to declare: "Any system of the civil service under which the subordinate positions of the government are considered rewards for mere party zeal, is fatally demoralizing; and we therefore favor a reform of the system by laws which shall abolish the evils of patronage and make honesty, efficiency, and fidelity the essential qualifications for public positions, without practically creating a life-tenure of office."

Since then Congress have passed an act rendering success in a competitive examination a necessary preliminary to appointment to a certain class of offices. Though limited in its operation, it yet tends to form the public opinion without which laws are valueless, and open the way to every man who has not neglected his opportunities in the public schools. Many thousand Democrats were appointed under its auspices by Mr. Arthur, as thousands of Republicans have been by Mr. Cleveland. Unhappily the measure does not cover

<sup>1</sup> See 1 May's Constitutional History of England, 317.

the whole ground; and it is still possible to use patronage for political purposes; to wring money from the pockets of office-holders for party and private ends through the dread of dismissal, and to employ the power of appointment and removal as a means of seduction, of favoritism, and of intimidation. Such practices have in the course of the last fifty years been so ingrained in public life that the present generation of practical politicians must become extinct or give place to men who do not regard country as subordinate to party, or use party as a means of personal advancement and of amassing money, before we can hope for a thorough reform of the public service.<sup>1</sup>

De Tocqueville long since said that all the European races would follow the same law of development as ourselves, and end in the democracy which had been established here; and the subsequent course of events tends to show the truth of his remark.<sup>2</sup> When such a change has occurred, it is as impossible for a nation to revert to monarchy or to aristocracy as it would be for an individual to renew his youth; and the choice lies between a well-ordered popular government and the Cæsarism which may afford a temporary refuge from anarchy, but never yet stayed the downward course of any people. The conditions are nowhere so favorable to the solution of such a problem as in the United States; and if we fail, what country can hope for success? The issue does not therefore concern ourselves alone, but mankind; and the event must necessarily depend on such an education of the people as will

<sup>1</sup> It is difficult to escape from a false position, even when it is due to the faults of others. For twenty years before the advent of the present administration, one half of the people of the United States were systematically excluded, for opinion's sake, from the public service; and just as is the theory of civil-service reform, it could not equitably be applied until an injustice of such long standing was rectified by equalizing the distribution of office. Had Mr. Cleveland taken this ground, it would have appeared reasonable to every fair-minded man, and he might have avoided the seeming breach of pledges which he honestly endeavored to maintain, in the face of a pressure which few men could have withstood with as much firmness.

<sup>2</sup> De Tocqueville, *La Démocratie en Amérique*, vol. ii. ch. ix. p. 190.

inspire them not only with a love of freedom, but with a knowledge of the dangers with which it is threatened, and the means by which they can be averted or overcome. Once convince the masses that party, as now organized, is adverse to their interests and the general good, and that civil-service reform is the much-needed corrective, and we may rely on their common-sense and patriotism for the rest. No man who has the requisite opportunities and knowledge should regard himself as exempt from this duty; but it belongs primarily to the profession which, from its acquaintance with the principles of constitutional law, is best fitted for such a task. The influence of the Bar, as De Tocqueville finely pointed out, is greater in this country than in any other, and has been largely exerted for good.<sup>1</sup> The Constitutional Conventions which have done so much good work in the various States were composed principally of lawyers, and are a convincing proof of what might be expected from the Bar if the people were free to choose their representatives. It is therefore to the legal profession, and above all to the young men who in a few years will take the lead, that I would appeal on behalf of our country to regard her as their client, and devote some portion of their laborious days and nights to the cause of reform. I believe that cause to be necessary and just, and that with such advocacy it will prevail.

<sup>1</sup> De Tocqueville, *La Démocratie en Amérique*, vol. ii. ch. viii. p. 174.

## LECTURE XV.

**Taxation by the United States.** — The Power of Congress to Tax for Purposes in its Judgment conducive to the Common Defence and General Welfare absolute and unlimited. — Distinction between expending the Proceeds of Taxation in Internal Improvements and assuming the Control of such Improvements. — Jurisdiction of the Supreme Court in Questions of Taxation. — Direct Taxes.

THE eighth section of the first article of the Constitution is as follows: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

This clause has been regarded in different aspects, and as variously interpreted. Agreeably to one view, it is not a single grant, but confers two very different powers, which are incongruously grouped under the same head, — a power to raise money by taxation, and a power to provide for the common defence and general welfare. Agreeably to the other, it is simply an authority to lay taxes, subject to two qualifications, — that taxation shall be uniform, and that it shall not be imposed for objects which are merely local and do not concern the entire people. The former view is now generally conceded to be repugnant both to the interpretation which would naturally be put on the clause if it stood alone, and to the tenor of the instrument as a whole. It wrests the latter part of the paragraph from its antecedent, and gives it an entirely different meaning from that which it would have if considered relatively as part of the same sentence. Unpunctuated, the clause is simply a power to raise money by taxation, with a designation of the purposes for which it may be expended; read with a semicolon after "excises," it becomes

a substantive grant so broad and sweeping as to confer not only all that is subsequently enumerated, but much which the specific grants impliedly exclude.

A government authorized to provide for the common defence and general welfare is virtually absolute, because it must determine what means are requisite for the end in view, and its decision will necessarily be binding on the courts. If such were really the meaning of the clause under consideration, the Tenth Amendment, that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," would have no real significance, since when all has been in effect given, there can be nothing to withhold; and the concluding words would supersede the first or render them superfluous, because the duty to provide for the common defence and general welfare would imply the right to tax as indispensable to its fulfilment. The clause should therefore, as Story observes, be read as if it contained two words, which are in effect implied, and will then stand as follows: "Congress shall have power to lay and collect taxes, duties, imposts and excises, *in order* to pay the debts and provide for the common defence and general welfare of the United States;" the common defence and general welfare and the payment of the public debts being the ends for which the power is conferred, and taxation a means for their attainment.<sup>1</sup>

The field of controversy is thus narrowed; but there is still room for doubt. Is the clause an authority to raise money, and consequently to appropriate it, for any purpose which Congress may deem conducive to the common defence or general welfare? Or does it merely authorize the laying and collection of taxes for the execution of the enumerated powers? The former is the literal import of the words employed, and merely sanctions what would be implied under every form of government but our own; that is, the right to

<sup>1</sup> Story on the Constitution, sect. 890; see Madison's Letters to Alexander Stevenson, Nov. 27, 1830, 4 Madison's Writings, 120, 126, 131.

expend the public revenue for any purpose that may be deemed conducive to the public good.

The first Secretary of the Treasury accordingly held, in a report on manufactures made in the year 1791, that the national legislature may, in the exercise of their discretion, "pronounce upon the objects which concern the general welfare and for which under that description an appropriation of money is requisite and proper," and that "whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce is within the sphere of national councils as regards the appropriation of money."

This view is nevertheless open to objection as carrying the power of taxation beyond the verge of the Constitution, and authorizing the government to take money from the citizen for uses which it cannot accomplish in its sovereign capacity, and which are, on the contrary, reserved to the several States. The right of providing for popular education confessedly belongs to them, and not to the United States; and yet the latter may, if the Hamiltonian argument is sound, lay taxes with the view of endowing public schools which it can neither establish nor regulate. The leader of the Anti-Federal or Democratic party accordingly contended that such an interpretation would confer a general authority extending much beyond the enumerated powers and having no bounds but the good pleasure of Congress, and that the clause in question should consequently be read with a due regard to the plain intent of the Constitution to restrict the operation of the General Government to certain objects which are specifically enumerated.<sup>1</sup> So Madison took occasion, in his once celebrated report on the Virginia Resolutions of 1798, to characterize Hamilton's doctrine as "extraordinary," and to declare that "whenever money has been raised by taxation and is to be applied to a particular measure, a question arises whether the particular measure be within the enumerated powers of Congress. If it be, the money requisite for

<sup>1</sup> See the Kentucky Resolutions, drawn by Jefferson, of November 10, 1798, and the Virginia Resolutions of the same year from the pen of Madison, 4 Elliott's Debates (2d ed., Phila., 1876), 528, 542.

it may be applied to it; if it be not, no such appropriation can be made.”<sup>1</sup> Such a view may appear singular when contrasted with his support of a protective tariff as an indirect means of accomplishing an object nowhere enumerated in the Constitution.<sup>2</sup> Whether money shall be raised by taxation and then laid out in bounties, or purchasers shall be compelled to pay a higher price to manufacturers than they would have to give abroad, would seem to be merely a question of form.

The teachings of politicians while in opposition are often in direct and painful contrast to their practice after they have assumed the responsibilities of office. Madison’s argument against a discretionary right to make appropriations for the common defence and general welfare may have been sounder than those which he used in the same document to prove that the Constitution is a compact between the States, and that each State may, and indeed ought to, judge whether the agreement has been violated, and if need be, interpose in “its sovereign capacity” to correct the error; but the effect was to preclude the expenditure of the public revenue for many purposes which concern the nation not less than the several States. It is not, therefore, surprising that the doctrine of the Virginia resolutions should have been systematically disregarded when the Democratic party came into power, and that appropriations should have been made for measures not within the enumerated powers, and which Congress could not carry into effect by legislation.<sup>3</sup>

Fifteen millions were expended under Jefferson for the purchase of Louisiana, and a large sum granted for the construction of a road leading from the Valley of the Cumberland to that of the Ohio. A like policy was followed by Madison and Monroe throughout their respective terms of office; and the former, while denying the right of the United

<sup>1</sup> Madison’s Report, etc., 4 Elliott’s Debates (2d ed., Phila., 1876), 525, 526.

<sup>2</sup> 4 Madison’s Writings, 5, 7, 243.

<sup>3</sup> Jackson’s Veto of the Maysville Road Bill, 4 Elliott’s Debates (2d ed., Phila., 1876), 528.

States to make internal improvements by virtue of its sovereign authority as a government, and vetoing a bill which had passed both houses for such objects, used language which, as Jackson subsequently pointed out in an official communication to Congress, "must be regarded as a concession that the right of appropriation is not limited by the power to carry into effect the measure for which the money is asked, as was formerly contended.<sup>1</sup>"

Madison's letter to Reynolds Chapman of Jan. 6, 1831, virtually concedes the right to improve harbors and rivers which, like the Mississippi, are essential to commerce, as established under the practice of a government which had been in Democratic keeping for thirty years.<sup>2</sup> So Monroe acknowledged that in the early stages of the government he had inclined to the opinion that it had no right to expend money except for the performance of acts authorized by the other specific grants of power according to a strict construction of them, but that on further reflection and observation his mind had undergone a change, and that his opinion then was "that Congress have unlimited power to raise money, and that in its appropriation they have a discretionary power, restricted only by the duty to appropriate to purposes of common defence and of general national, not local or State, benefit." This recantation was, like that made previously by Madison, a virtual adoption of the Hamiltonian theory that the power of Congress over the Treasury is in effect absolute, and extends to the appropriation of money for any object which in their judgment will conduce to the defence of the country or promote its welfare. Such, in fact, has been the practice since the government went into operation; and the right can hardly be disputed in the face of a usage which will soon extend through an entire century.<sup>3</sup>

<sup>1</sup> Jackson's Veto of the Maysville Road Bill, 4 Elliott's Debates (2d ed., Phila., 1876), 525, 526.

<sup>2</sup> 4 Madison's Writings, 148.

<sup>3</sup> Veto of the Maysville Road Bill, 4 Elliott's Debates (2d ed., Phila., 1876), 526.

In the greater number of the instances above referred to, the government did not act in its sovereign capacity, but like a rich and public-spirited individual who draws his purse-strings for the common good; and therefore they do not tend to show that Congress may, by virtue of the eighth section of the first article, devise internal improvements and enact such laws as are necessary and proper to render the scheme effectual.

It is one thing to construct a highway by virtue of the power of eminent domain, and exercise an absolute jurisdiction over it when made, and another to lay out a road through land acquired by purchase with the consent of the State through which it passes. So Congress may well be entitled to appropriate money for public education, or even to build and endow colleges and schools, and yet want the right to make attendance compulsory and enforce it by fines or penalties.

Accordingly, a bill providing that a certain fund should be applied from time to time "in constructing such roads or canals, or improving the navigation of such water-courses, or both, in each State, as Congress shall, with the assent of such State, direct," was vetoed by Madison, as asserting a right to construct roads and canals within the limits of the States, unknown to the Constitution, and beyond the power of the several States to confer. Such a power could not, in his opinion, be derived from the power to regulate commerce, without a latitude of construction at variance with the ordinary import of the terms; and to refer it to the clause to provide for the common defence and general welfare would be contrary to the established and consistent rule of interpretation, as rendering the special and careful enumeration of the powers, which follows that clause, nugatory and improper. The power which it conferred should therefore be confined "to cases which are to be provided for by the expenditure of money," and so restricted "would still leave within the legislative power of Congress all the great and most important measures of government; money being the ordinary and necessary means of carrying them into

execution.”<sup>1</sup> In like manner Monroe held a bill to establish gates and tolls on the road which had been built by the United States from Cumberland across the Alleghanies to the Ohio, and enforce the payment of the tolls by penalties, to be unconstitutional, as implying a power to adopt and execute a system of internal improvements by legislation operating within the States and irrespective of their laws. A right to impose duties to be paid by all persons passing along a certain road and on horses and carriages, involved the right to take land from the proprietor at a valuation, and to pass laws to protect the road from injury; and if it existed as to one road, it existed as to every other road and to as many roads as Congress might think fit to establish. A right to legislate for one of these purposes implied a right to legislate for all of them. It was a complete right of jurisdiction and sovereignty for all the purposes of internal improvement, and not a right to appropriate money under the power vested in Congress to make appropriations, under which power the road was originally commenced and had been executed, with the consent of the States through which it passed. The United States had no such power, and the States could not grant it save by an amendment of the Constitution.

They might assent to the expenditure of money within their limits, but they could not confer sovereignty or jurisdiction through a special compact with the United States. It was not pretended that the United States were specifically authorized to make internal improvements; but the right had been deduced by the advocates of such measures, 1st, from the right to establish post-offices and post-roads; 2d, from the right to declare war; 3d, to regulate commerce; 4th, to pay the debts and provide for the general welfare; 5th, from the power to make all laws necessary and proper for carrying into execution all the powers vested in the government of the United States; 6th, from the power to dispose

<sup>1</sup> Madison's Veto of the Bonus Bill, 4 Elliott's Debates (2d ed., Phila., 1876), 469.

of and make all needful rules and regulations respecting the territory and other property of the United States. According to his judgment, it could not be derived from any of those powers nor from all of them combined, and consequently did not exist.<sup>1</sup>

They who adhere to the principles on which the Constitution was framed by Madison and his associates, but which he abandoned in a few years for the doctrine subsequently known as nullification, and which finally ripened into secession,<sup>2</sup> may yet agree with him and Mr. Monroe that Congress have no general or sovereign authority to build bridges, railroads, and canals, that might not be exercised by a private individual with the assent of all the parties interested, and subject to the jurisdiction of the State in which the work is executed. In other words, although the United States may go into the market and do whatever can be done by the use of money without the exercise of legislative, executive, or judicial power, they cannot, speaking generally and where there are no special grounds, do more. But it does not follow that the government may not use its sovereign powers, including that of taking private property for public use, directly or through a corporation created for that object, for the construction of railways, highroads, and bridges, or to improve the navigation of rivers, when such measures are requisite as a means of moving troops and munitions of war, of carrying the mails, or even of opening a needful avenue for commerce; especially where there are no existing highways, or none that will answer the purpose, and a section of the country would be virtually cut off from the rest if the United States did not intervene. The just inference consequently is that internal improvements may be justifiable as a means, if not as an end; that is, whenever they are essential to the due execution of any power that has been specifically conferred on Congress.<sup>3</sup>

The United States may therefore, under the power to regulate commerce, not only deepen the bed of a navigable river,

<sup>1</sup> 4 Elliott's Debates (2d ed., Phila., 1876), 525.

<sup>2</sup> *Ante*, p. 5; Hildreth, History of U. S., 319.

<sup>3</sup> See Madison to Reynolds Chapman, 4 Madison's Writings, 148.

but close a collateral channel which lessens the force and volume of the principal stream, although the effect is to deprive an adjacent landholder of the ready access to the sea which he previously enjoyed.<sup>1</sup> So the opening and construction of a road may be constitutional when it is essential to interstate or foreign commerce, or for defence in war.

The need for the Cumberland road as a means of passage across the Alleghanies and to retain the hold on the valley of the Ohio, which was endangered by treasonable plots like Burr's, was so manifest as to overbear the objections drawn from a strict construction of the Constitution; and it was on like grounds that Congress incorporated the great railway companies whose lines connect the Atlantic and Pacific slopes and endowed them with the sovereign right of eminent domain. I may add that the question for what purposes the United States may use the power of taxation, and to what objects the proceeds can constitutionally be applied, is legislative, not judicial, and the errors of Congress cannot be corrected by the courts, except it may be, where the tax is manifestly wanting in the uniformity which the eighth section of Article I. requires. It is therefore one of the instances where the Supreme Court cannot intervene to draw the line between the States and the General Government, or shield the citizen from an abuse of power, however gross, and which consequently give color to Jefferson's contention that as there should be no wrong without a remedy, a State may declare such laws null and void.<sup>2</sup> The just inference seems to be the direct opposite, — that where the wrong consists in the misuse as distinguished from a usurpation of power, and redress cannot be had in court, it should be sought at the polls, and not in a course that will lead to civil war.

Agreeably to Section 9 of Article I., paragraph 4, "no capitation or other direct tax shall be laid except in proportion to the census or enumeration hereinbefore directed to be taken;" while Section 3 of the same Article requires that

<sup>1</sup> *South Carolina v. Georgia*, 3 Otto, 5; *ante*, p. 111.

<sup>2</sup> See Hildreth, *History of U. S.*, Vol. V. p. 320.

representation and direct taxes shall be apportioned among the several States . . . according to their respective numbers. Direct taxes in the sense of the Constitution are poll-taxes and taxes on land.<sup>1</sup> A law requiring the payment of a given sum for every watch, horse, or carriage, is consequently valid, though laid without regard to population ; and a tax laid by Congress on the notes of the State banks comes under the same category.<sup>2</sup> The reason for this interpretation is obvious : chattels ordinarily have a value which is everywhere much the same, while the price of land depends on the local demand for it, and increases as population grows more dense. The object in both cases is equality ; but owing to the diversity of the subject-matter, the rule is necessarily different. So an income-tax ought to be in proportion, not to the number of the inhabitants, but to their annual receipts, and is not, therefore, a direct tax which must be laid according to the last census or enumeration.<sup>3</sup>

The right to tax, like the other grants in the Constitution, carries with it the power to use any appropriate means to render the right effectual ; and hence while Congress have no general power to regulate contracts, and such legislation would be invalid, they may enact that deeds or written agreements shall be stamped, and provide that they shall be inadmissible in evidence, or invalid, if the condition be not fulfilled.<sup>4</sup>

<sup>1</sup> *Hylton v. The United States*, 3 Dallas, 175.

<sup>2</sup> *The Bank v. Fenno*, 8 Wallace, 533.

<sup>3</sup> *The Pacific Insurance Co. v. Soule*, 7 Wallace, 434.

<sup>4</sup> *Ante*, p. 109.

## LECTURE XVI.

Taxation by the States. — Express Restrictions in the Constitution of the United States. — Duties on Imports or Exports distinguished from Taxes on Sales. — Tonnage Taxes. — Restrictions Implied in the Supremacy of the United States Government. — Taxation impeding the Efficient Exercise of the Powers of the United States distinguished from Taxation of the Property of Corporations chartered by Congress or of the Agents of the United States. — Similar Restriction upon the Taxation of the Instruments of State Government by the United States. — Taxation of the Paper Currency of State Banks. — Restrictions upon State Taxation implied in the Power of Congress to regulate Commerce. — Freight Taxes. — Licenses. — Passenger Taxes. — Restrictions implied in the Guaranty of Equal Privileges to the Citizens of every State. — Discrimination in Wharfage Fees.

THE States have a general power of taxation, which is, nevertheless, subject to some express and various implied limitations, and must be exercised in due subordination to the paramount authority of the National Government.<sup>1</sup>

The express restrictions are that "no State shall without the consent of Congress lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws. . . . No State shall without the consent of Congress lay any duty on tonnage."

The motive for the above prohibitions was presumably to prevent the States from frustrating the powers which had been bestowed on the General Government. Congress obviously could not regulate the commercial relations of the United States with foreign nations if imports might be subjected to unequal or excessive taxation, and each State could in effect establish a tariff of its own. A State tax, therefore, cannot

<sup>1</sup> *Lane County v. Oregon*, 7 Wallace, 77; *Union Pacific R. R. Co. v. Peniston*, 18 Id. 29.

be levied on goods that have been brought from abroad while they are passing through the custom-house or are in the hands of the importer ; nor can he, or the agent or auctioneer whom he employs, be obliged to procure a license before effecting a sale, because such a requirement is virtually a tax and would moreover operate as a regulation of commerce.<sup>1</sup> So exports cannot be taxed directly or by laying a duty on the bills of lading signed by the master of the vessel.<sup>2</sup>

The prohibition does not apply to imports from other States,<sup>3</sup> nor to foreign imports after they have passed from the importer's hands and become a part of that mass of personal property which is subject to the jurisdiction of the States.<sup>4</sup> A different interpretation would embarrass the State governments, by obliging them to refrain from the taxation of merchandise and the persons by whom it is bought and sold, or confine it to their own productions, contrary to the equality which it is the object of the Constitution to promote.<sup>5</sup> It was accordingly held in *Woodruff v. Parham* that a "uniform tax on sales may be valid whether the vendor's business is confined to the products of the State, or includes articles grown or manufactured elsewhere ;" and it was said in this instance that a duty on bills of lading for goods shipped to another State would be valid, did it not operate as a restraint on the commerce among the States, which has been exclusively confided to Congress. For like reasons, imported liquors are not exempt from the license or prohibitory laws of the several States, although they are still in their original packages, and can be identified as

<sup>1</sup> *Brown v. Maryland*, 12 Wheaton, 419.

<sup>2</sup> *Almy v. California*, 24 Howard, 169.

<sup>3</sup> *Woodruff v. Parham*, 8 Wallace, 123.

<sup>4</sup> *License Cases*, 5 Howard, 504.

<sup>5</sup> In *Brown v. Houston*, 114 U. S. 623, 628, it was said to be immaterial that the coal was still lying at the wharf and had been brought by third persons with a view to exportation, because the object of the importer was not to send it abroad, but to dispose of it there. But a tax on the arrival or landing of passengers or freight from another State is in effect a tax on the transportation which is essential to interstate commerce, and therefore invalid. *Gloucester Ferry Co. v. Pa.*, 114 U. S. 196, 203.

having passed through the custom-house and paid duty to the General Government.<sup>1</sup> The wholesale or retail sale of liquor by or on behalf of the importer is, nevertheless, beyond the reach of State taxation; and if he may be required to procure a license, or submit to such other needful regulations as the peace and good order of society require, these cannot, as it would seem, be carried to the length of prohibition consistently with the Constitution.

A tax on imports from other States must nevertheless be so laid as not to operate as a regulation of commerce, or contravene the provision that the citizens of each State shall be entitled to the privileges and immunities of the citizens of the several States. It must consequently be equal in its operation, or at least not so drawn as to discriminate against the goods of other States; and an attempt to contravene this rule, or subject imported goods to a greater burden than the State imposes on her own products, will be contrary to the letter and spirit of the Constitution of the United States.<sup>2</sup> And if this effect is produced, it matters not that the tax is laid under the police power with a view to prevent the sale of intoxicating drinks.

The prohibition of duties on the cargo would be of little value if the vessels which serve as a means of transportation could be taxed at pleasure; and tonnage taxes are, as we have seen, not less unconstitutional than those on imports and exports. Ships cannot therefore be singled out by a State for taxation, and any duty on them as such will be invalid, whether it takes the form of a fixed sum on the entire tonnage, or of a sum to be ascertained by comparing the amount of tonnage with the rate prescribed by the legislature.<sup>3</sup> I may add that the clause is broader than the end would seem to require, and extends beyond interstate and external commerce to vessels which are exclusively employed

<sup>1</sup> License Cases, 5 Howard, 504.

<sup>2</sup> *Woodruff v. Parham*, 8 Wallace, 140; *Walling v. Michigan*, 116 U. S. 446.

<sup>3</sup> *Steamship Co. v. Port Wardens*, 6 Wallace, 31; *State Tonnage Tax Cases*, 12 Id. 210.

in navigating the waters of the State which lays the tax.<sup>1</sup> Such an imposition cannot be rendered valid by a change of terms or calling that a license which is really a charge on commerce ; and an ordinance which in fixing the sum to be paid for a license to pursue professions, trades, or other callings names a sum to be collected from persons owning or running boats to and from the Gulf of Mexico and the city of New Orleans is consequently an infringement of the power of the General Government to regulate commerce. The boats might have been taxed in proportion to their value, or the business according to receipts and profits ; but the running of the boats is navigation, and beyond the reach of State legislation in any form.<sup>2</sup>

The object of the Constitution is to preclude the taxation of vessels as instruments of commerce, and not to exempt the owners of such property from contributing their share of the expenses of government. The taxpayer may consequently be assessed in proportion to what he owns, whether it consists of ships, merchandise, or houses ; and hence a citizen may be assessed by the State where he resides for his right or interest in a vessel as measured by its market price or value.<sup>3</sup> “ Taxes,” said Clifford, J., “ levied by a State upon ships and vessels owned by the citizens of the State as property, and based on a valuation of the same as property, are not within the constitutional prohibition.”<sup>4</sup>

For like reasons a tax may be laid on the income derived from vessels, railways, or other property employed in interstate or foreign commerce, there being a manifest distinction between a tax on transportation and a tax upon its fruits when realized and reduced to possession so as to

<sup>1</sup> State Tonnage Tax Cases, 12 Wallace, 204, 219; *Peete v. Morgan*, 19 Id. 581.

<sup>2</sup> 112 U. S. 69, 74,

<sup>3</sup> *Hays v. Pacific Mail Co.*, 17 Howard, 596; *Morgan v. Parham*, 16 Wallace, 471; *Transportation Co. v. Wheeling*, 99 U. S. 278; *Wiggins Nav. Co. v. East St. Louis*, 107 Id. 365; *Moran v. New Orleans*, 112 Id. 69, 74. See *Huse v. Glover*, 119 U. S. 543, 549.

<sup>4</sup> State Tonnage Tax Cases, 12 Wallace, 204.

become a part of the general property and capital of the tax-payer.<sup>1</sup>

The implied restraints on State taxation result from the established principle that the powers of the United States are actually or potentially subtracted from the sum of the powers of the States, and that a State consequently cannot exercise any power, however indisputably its own, in a way to conflict with the legitimate exercise of the powers of Congress. It follows that the States cannot tax the property of the General Government, nor the means through which the functions of that government are performed. A bank or other corporation chartered by the United States is within this principle,<sup>2</sup> and so are the salaries of the officers and servants of the United States.

The question arose in *McCulloch v. The State of Maryland*,<sup>3</sup> under a State law taxing the branch of the Bank of the United States established at Baltimore. The power of the States to raise money by taxation is under ordinary circumstances general, embracing corporations as well as individuals; and it was said on behalf of the defendants in error that as this power was express and inherent, it would not fail merely because the subject over which it was exercised was a body corporate created by Congress under an authority not given in terms by the Constitution. If the General Government had a right to tax banks chartered by the States, which was universally conceded, why might not the States tax a bank that had been chartered by Congress? To maintain the contrary was first to expand the express powers given by the Constitution into a multitude of implied powers, and then make each of the implied powers a limitation or restriction on the express powers of the States. On the other hand, Mr. Pinckney, for the United States, observed

<sup>1</sup> *Tax on Railway Gross Benefits*, 15 Wallace, 284; *Moran v. New Orleans*, 112 U. S. 69, 74.

<sup>2</sup> *McCulloch v. The State of Maryland*, 4 Wheaton, 316; *Osborn v. The Bank of the United States*, 9 Id. 738; *City of Pittsburg v. The First National Bank*, 55 Pa. St. 45.

<sup>3</sup> 4 Wheaton, 316.

that there was no express provision in the Constitution exempting any national institution or property from State taxation. It was only by implication that the Treasury, the army, the navy, the judiciary of the Union were sheltered from taxation by the States; yet they were confessedly exempt, and must be, or it would be in the power of any State to impose burdens that would preclude their use. Whatever the United States had a right to do, the individual States had no right to undo. The power of Congress to establish a bank must, like its other sovereign powers, be supreme, or it would be nothing. Being an exercise of paramount authority, it could not be subject to any other power. There was a manifest repugnance between the power of Maryland to tax and the power of Congress to establish the Bank of the United States. A power to build up what another might pull down at pleasure, was a power that might provoke a smile, but could not be effectual for any other purpose. The law of Maryland operated directly on the bank, and might destroy it. A right to tax without limit or control was substantially a power to destroy, because there was a limit beyond which no institution and no property would bear taxation. And if the existence of the power was conceded, it obviously could not be controlled by the court, nor would it be in the power of the court to discriminate between an act passed in good faith for the purpose of revenue and one designed to legislate the Bank of the United States out of existence. If one national institution might be destroyed in this manner, all might be destroyed in the same manner. If the States could tax, there was no limit but their discretion, and the national bank would depend on the discretion of the State governments for its existence. The object of levying this tax was alleged to have been revenue to the State. In the next case the object might be to expel the bank from the State. If the right to tax was conceded, it would be impossible to draw the line or distinguish the abuse of the power from its use.

These arguments were to a great extent adopted by Chief-Justice Marshall, who said, in delivering the opinion of the

court, that the power of taxation was one of vital importance ; it was retained by the States, and might confessedly be exercised by them, notwithstanding the existence of a similar power in the Union. These were truths universally conceded. But it was also true that Congress might, in the exercise of the powers conferred by the Constitution, withdraw any subject from taxation by the States. The Constitution and the laws made in pursuance thereof were supreme. They controlled the Constitutions and laws of the respective States, and could not be controlled by them. If the powers of the States were sovereign, those of the United States were not only sovereign but paramount. A power in Congress to create was incompatible with a power in the States to destroy ; and when such a repugnancy existed between a State law and a law passed by Congress, it followed from the supremacy of the United States that the power of the State would cease, or be inoperative.

The argument on the part of the State of Maryland was, that since the powers of the States should not be exercised in hostility to Congress, it was to be presumed that they would not so exercise them, and that in this confidence they were left free to act by the Constitution. Such a discretionary power had been conferred on the General Government, was of the very essence of sovereignty, and should therefore be possessed by the States. The answer was that, such a discretion ought not to be confided without some security against abuse. When the people of a State taxed themselves or the operations of their own government, they would be aroused by suffering to a consciousness of error if the tax exceeded the proper limits ; but when they taxed the property or institutions of the General Government, this restraint did not exist, or existed only in an inferior degree. Taxation should attend upon and be co-extensive with representation ; and it was not just that the means employed by the people of all the States for the common good should be taxed by a legislature in which the people of one State only were represented.

This demonstration may be regarded as conclusive ; and it is now well settled that while the States may in general tax

every person or thing within their jurisdiction, they can lay no tax that will impede the operations or preclude the exercise of the powers conferred on the government of the United States by the Constitution. A tax on the bonds or loans of the United States is consequently invalid, because it might obviously be carried to such a pitch that no one would lend, and thus in effect preclude the government from borrowing.<sup>1</sup> The rule applies whether the tax is laid on the loan *eo nomine*, or on a gross amount or valuation which includes the loan. So a tax on the aggregate amount of the stock or capital of a national or State bank will be invalid, as it regards so much thereof as consists of such loans or bonds.<sup>2</sup> The exemption is for the benefit of the United States, and may be waived by Congress; and the charters of the existing national banks provide that their stocks may be taxed by the States where they are situated, though not elsewhere,<sup>3</sup> and the amount deducted from the dividends of non-resident stockholders.<sup>4</sup>

It is established, conformably to the principles above stated, that land belonging to the United States is exempt from local taxation, whether it was ceded by the State, acquired by purchase, or in the exercise of the right of eminent domain, and without regard to the purposes for which it is employed, because all the property of the government is in contemplation of law public and held for the general good.<sup>5</sup> A contrary

<sup>1</sup> *Bank of Kentucky v. The Commonwealth*, 9 Bush, 46; *Van Allen v. Assessors*, 3 Wallace, 573; *Weston v. The City Council of Charleston*, 2 Peters, 449.

<sup>2</sup> *Van Allen v. Assessors*, 3 Wallace, 573; *The Bank of Commerce v. The City of New York*, 2 Black, 620; *The City of Pittsburg v. The National Bank*, 55 Pa. St. 45, 50; *The Bank Tax Case*, 2 Wallace, 200; *McCulloch v. The State of Maryland*, 4 Wheaton, 316.

<sup>3</sup> *Tappan v. Bank*, 19 Wallace, 490; *School Directors v. Hepburn*, 79 Pa. St. 159.

<sup>4</sup> *National Bank v. The Commonwealth*, 9 Wallace, 362; *The People v. The Commissioners*, 4 Id. 244; *Van Allen v. The Assessors*, 3 Id. 573.

<sup>5</sup> *Van Brocklin v. Temper*, 117 U. S. 151; *Northern Pacific R. R. Co. v. Traill*, 115 Id. 600; *Union Telegraph Co. v. Richmond*, 26 Grattan, 1; *West Hartford v. Commissioners*, 44 Conn. 360; *Wisconsin R. R. Co. v. Taylor County*, 52 Wis. 37.

opinion involves the fallacious assumption that a State may be entitled to draw from the General Government money which that government may in its turn be compelled to replace by drafts on the people of the State, — to the benefit of the tax-collector and with the waste incident to a multiplicity of hands.

The doctrine of *McCulloch v. The State of Maryland* was not intended to exempt the citizen from taxation for the amount or value of his interest in banking or other companies chartered by the General Government, although an unequal impost laid professedly on the shareholders, but really aimed at the body corporate, would presumably be held invalid. As in the analogous case of a vessel, it is the instrument which must not be taxed, and not persons who have chosen it as a means of investment.

It was accordingly held in *Van Allen v. The Assessors*<sup>1</sup> that the stockholders of a national bank may be taxed for the value of their respective shares. Chase, C.-J., Wayne and Swayne, JJ., dissented, on the ground that if such a burden could be imposed, it might be made so onerous as to deter capitalists from holding the stock of such institutions, and thus defeat the end which Congress had in view.

In like manner, a State may tax the property of a private corporation, though created by the General Government with a view to the attainment of a public end. It is immaterial, as regards the application of this principle, that the property in question is essential to the end for which the corporation was chartered or the agency established; as, for instance, the road-bed and rolling-stock and fixtures of a railway created by Congress for national purposes.<sup>2</sup>

The subject was comprehensively considered, in the last case cited, by Mr. Justice Strong in an opinion which does not admit of condensation, and is therefore appended. It was there held that the States and the General Government should use their

<sup>1</sup> 3 Wallace, 573, 584.

<sup>2</sup> *Thompson v. The Pacific R. R.*, 9 Wallace, 579; *Van Brocklin v. Temper*, 117 U. S. 151, 177; *Union Pacific R. R. Co. v. Peniston*, 18 Wallace, 29.

concurrent powers, including that of taxation, in such wise as not to impede each other in the exercise of their appropriate functions, and that any impost levied by either which contravenes this rule will be invalid ; but it was justly observed that the hindrance must not be merely consequential or remote. Every impost laid by a State on the property or persons of its citizens necessarily in some degree lessens their ability to discharge the duty which they owe to the United States ; and yet no one would contend that this precludes such taxation. For like reasons the States may tax the property of the officers and agents of the United States, whether they are natural persons or corporations chartered by Congress, if the burden is imposed equally, and there is no discrimination against the government. Here the right ends ; and a State tax cannot be laid on a bank or other agency created by Congress, nor on the gross or net amount of its business receipts or profits, nor on its operations or the means by which they are conducted.

“No one ever doubted,” said Strong J.,<sup>1</sup> “that before the adoption of the Constitution of the United States each of the States possessed unlimited power to tax, either directly or indirectly, all persons and property within their jurisdiction, alike by taxes on polls, or duties on internal production, manufacture, or use, except so far as such taxation was inconsistent with certain treaties which had been made ; and the Constitution contains no express restriction of this power other than a prohibition to lay any duty on tonnage, or any impost or duty on imports or exports, except what may be absolutely necessary for executing the State’s inspection laws. As was said in *Lane County v. Oregon* :<sup>2</sup> ‘In respect to property, business, and persons within their respective limits, the power of taxation of the States remained and remains entire, notwithstanding the Constitution. It is, indeed, a concurrent power (concurrent with that of the General Government), and in the case of a tax upon the same subject by both governments, the claim of the United States as the supreme authority must be preferred ; but with this qualification it is absolute.’

<sup>1</sup> *Union Pacific R. R. Co. v. Peniston*, 18 Wallace, 29.

<sup>2</sup> 7 Wallace, 77.

“There are, we admit, certain subjects of taxation which are withdrawn from the power of the States, not by any direct or express provision of the Federal Constitution, but by what may be regarded as its necessary implications. They grow out of our complex system of government, and out of the fact that the authority of the national government is legitimately exercised within the States. While it is true that the government cannot exercise its power of taxation so as to destroy the State governments or embarrass their lawful action, it is equally true that the States may not levy taxes, the direct effect of which shall be to hinder the exercise of any powers which belong to the national government. The Constitution contemplates that none of those powers may be restrained by State legislation. But it is often a difficult question whether a tax imposed by a State does in fact invade the domain of the General Government or interfere with its operations to such an extent or in such a manner as to render it unwarranted. It cannot be that a State tax which remotely affects the efficient exercise of a federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the States all power to tax persons or property. Every tax levied by a State withdraws from the reach of federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which federal taxes may be laid. The States are, and they must ever be, co-existent with the national government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States, or prevent their efficient exercise.

“Admitting then fully, as we do, that the company is an agent of the General Government, designed to be employed, and actually employed, in the legitimate service of the government, both military and postal, does it necessarily follow that its property is exempt from State taxation?

“In *Thompson v. The Union Pacific R. R. Co.*,<sup>1</sup> after

<sup>1</sup> 9 Wallace, 579.

much consideration, we held that the property of that company was not exempt from State taxation, though their railroad was part of a system of roads constructed under the direction and authority of the United States, and largely for the uses and purposes of the General Government. The company in that case were agents of the government precisely as these claimants are, to the same extent and for the same purposes. Congress had made the same grants to them, and attached to the grants the same conditions. They too had received from Congress grants of land, and of bonds, and of a right of way for the purpose of aiding in the construction of their railroad and telegraph line, but with the condition that they should keep their railroad and telegraph line in repair and use, and should at all times transmit despatches over their telegraph line, and transport mails, troops, and munitions of war, supplies and public stores, upon their railroad for the government whenever required to do so by any department thereof, and that the government should at all times have the preference in the use thereof for the purposes aforesaid. There is no difference which can be pointed out between the nature, extent, or purposes of their agency and those of the corporation complainants in the present case. Yet, as we have said, a State tax upon the property of the company, its road-bed, rolling-stock, and personalty in general, was ruled by this court not to be in conflict with the Federal Constitution. It may therefore be considered as settled that no constitutional implications prohibit a State tax upon the property of an agent of the government merely because it is the property of such an agent. A contrary doctrine would greatly embarrass the States in the collection of their necessary revenue, without any corresponding advantage to the United States. A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops, and munitions of war are carried upon almost every railroad. Telegraph lines are employed in the national service; so are steamboats, horses, stage-coaches, foundries,

ship-yards, and multitudes of manufacturing establishments. They are the property of natural persons, or of corporations, who are instruments or agents of the General Government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the States, it is manifest that the State governments would be paralyzed. While it is of the utmost importance that all the powers vested by the Constitution of the United States in the General Government should be preserved in full efficiency, and while recent events have called for the most unembarrassed exercise of many of those powers, it has never been decided that State taxation of such property is impliedly prohibited.

“Nothing, we think, in the past decisions of this court is inconsistent with the opinions we now hold. *McCulloch v. The State of Maryland*<sup>1</sup> and *Osborn v. Bank of the United States*<sup>2</sup> are much relied upon by the appellants; but an examination of what was decided in those cases will reveal that they are in full harmony with the doctrine that the property of an agent of the General Government may be subjected to State taxation. In the former of those cases the tax held unconstitutional was laid upon the notes of the bank. The institution was prohibited from issuing notes at all, except upon stamped paper furnished by the State, and to be paid for on delivery, the stamp upon each note being proportioned to its denomination. The tax, therefore, was not upon any property of the bank, but upon one of its operations,—in fact, upon its right to exist as created. It was a direct impediment in the way of a governmental operation performed through the bank as an agent. It was a very different thing, both in its nature and effect, from a tax on the property of the bank. No wonder, then, that it was held illegal. But even in that case the court carefully limited the effect of the decision. ‘It does not extend,’ said the Chief-Justice, ‘to a tax paid by the real property of the bank in common with the other real property in the State, nor to a tax imposed on the interest

<sup>1</sup> 4 Wheaton, 316.

<sup>2</sup> 9 Wheaton, 738.

which the citizens of Maryland may hold in the institution in common with the other property of the same description throughout the State. But this is a tax on the operations of the bank, and is consequently a tax on the operations of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional.' Here is a clear distinction made between a tax upon the property of a government agent and a tax upon the operations of the agent acting for the government.

"In *Osborn v. The Bank* the tax held unconstitutional was a tax upon the existence of the bank, — upon its right to transact business within the State of Ohio. It was, as it was intended to be, a direct impediment in the way of those acts which Congress, for national purposes, had authorized the bank to perform. For this reason the power of the State to direct it was denied; but at the same time it was declared by the court that the local property of the bank might be taxed, and, as in *McCulloch v. Maryland*, a difference was pointed out between a tax upon its property and one upon its action. In noticing an alleged resemblance between the bank and a government contractor, Chief-Justice Marshall said: 'Can a contractor for supplying a military post with provisions be restrained from making purchases within a State, or from transporting the provisions to the place at which the troops were stationed? Or could he be fined or taxed for doing so? We have not heard these questions answered in the affirmative. It is true the property of the contractor may be taxed; and so may the local property of the bank. But we do not admit that the act of purchasing or of conveying the articles purchased can be under State control.' This distinction, so clearly drawn in the earlier decisions, between a tax on the property of a governmental agent and a tax upon the action of such agent, or upon his right to be, has ever since been recognized. All State taxation which does not impair the agent's efficiency in the discharge of his duties to the government has been sustained when challenged, and a tax upon his property generally has not been regarded as beyond the power of a State to impose. In *The National Bank v. The*

Commonwealth of Kentucky,<sup>1</sup> when the right to tax national banks was under consideration, it was asserted by us that the doctrine cannot be maintained that banks or other corporations or instrumentalities of the government are to be wholly withdrawn from the operation of state legislation. Yet it was conceded that the agencies of the federal government are uncontrollable by State legislation, so far as it may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government.

“It is therefore manifest that exemption of federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of federal powers.”

The taxing power of the United States is, in like manner, subject to an implied restraint arising from the existence of powers in the States which are obviously intended to be beyond the control of the General Government. Hence Congress cannot tax the courts, the municipal corporations or other agencies of a State, nor the salaries of its officers or judges;<sup>2</sup> and the revenue and public domain of the States are, for like reasons, equally exempt, whether held directly or through individuals, or bodies corporate acting by virtue of an authority conferred for governmental purposes.<sup>3</sup>

It follows from this principle that an act of Congress providing that railway or other corporations shall deduct five per cent from the amount of interest on their bonds, and pay

<sup>1</sup> 9 Wallace, 353.

<sup>2</sup> The United States *v.* Reese, 92 U. S. 214; The Collector *v.* Day, 11 Wallace, 113; Warren *v.* Paul, 22 Ind. 276; Barden *v.* Columbia Co., 33 Wis. 445; Fifield *v.* Close, 15 Mich. 509.

<sup>3</sup> The United States *v.* The Railroad Co., 17 Wallace, 322.

the amount thus withheld to the General Government, is a tax on the creditor, and not on the debtor, and cannot be enforced as to bonds held by a municipal corporation.

In *The United States v. The Railroad Co.*,<sup>1</sup> Hunt, J., said that the right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner and through their own agencies, was indisputable under the decisions of the Supreme Court and the practice of the government from its organization, and carried with it an exemption of those agencies and instruments from national taxation. If they could be taxed lightly, they might be taxed heavily; if justly, oppressively. Their operations might be impeded and destroyed if any interference was permitted. It followed that the cities and other municipal corporations chartered by the States could be taxed neither specifically nor through an impost on their revenues or the sources whence they were derived. Clifford and Miller, JJ., dissented, on the ground that if the property held by such corporations for governmental and other public purposes was exempt from taxation, investments made with a view to profit or for the sake of income were in effect private property and did not share the privilege.

To bring the means or agencies of a State within this rule and except them from federal taxation, they must nevertheless be used for some purpose exclusively within its province, and not subject to the paramount authority of the General Government. The question was considered in a recent judgment, which marks an era in our financial history. On no point is the intention of the Constitution clearer than that the currency shall be withdrawn from local legislation and governed by uniform rules. It accordingly declares that Congress shall have power to coin money and regulate the value thereof and of foreign coins, and that no State shall emit bills of credit or make anything but gold or silver coin a legal tender.<sup>2</sup> The States were thus precluded from issuing

<sup>1</sup> 17 Wallace, 322.

<sup>2</sup> *Craig v. The State of Missouri*, 4 Peters, 410.

paper money or compelling the citizens to accept it in payment; but they retained and exercised the right of chartering banking corporations endowed with many of the powers of natural persons, and, among others, with that of issuing negotiable promises to pay, in the form of bank-notes. These soon filled the channels of commerce, and became the principal, and during the frequent suspensions of specie payments the only available, circulating medium. The right to do indirectly what could not be done by direct means was challenged in the case of *Briscoe v. The Bank of Kentucky*; <sup>1</sup> but the practice had become inveterate, and was sustained by the Supreme Court, in opposition to a dissenting opinion by Story, J., who said that whether paper money was issued by a State, or by a corporation created by it for that end, the thing was unchanged, and the effect remained the same.<sup>2</sup>

So far does this doctrine extend that a State may charter a bank in which she is the sole stockholder, and which may consequently be dissolved or repealed by the legislature, and at the same time empower her creature or agent to emit the bills which would be unconstitutional if they came directly from her hand,<sup>3</sup> the ground taken being that bills so issued do not rest on the credit of the State, but on the credit of the capital stock, which is affected with a trust for the payment for its debts.

The Constitutional prohibition was thus evaded, and Congress deprived of the control over the currency which the framers of the Constitution had intended to confer. Hamilton's sagacious mind anticipated and sought to guard against the danger by creating a national bank. The institution answered the expectation of its founders, but was bitterly opposed by Jefferson and his coadjutors, and when the charter expired it was not renewed.

The natural consequences of this course were soon apparent in a great increase of paper currency, which filled the channels of trade to the exclusion of coin and the failure of

<sup>1</sup> 11 Peters, 257.

<sup>2</sup> *Darrington v. The Bank of Alabama*, 13 Howard, 12.

<sup>3</sup> *Curran v. The State of Arkansas*, 15 Howard, 304, 308.

the State banks to redeem their circulation. The Democratic party confessed their mistake by re-establishing the institution which they had condemned. Notwithstanding some errors at the outset, the second Bank of the United States was not less successful than the first in winning public confidence and giving uniformity to the currency, until it was assailed by a chief magistrate who took no lessons from experience and could tolerate no will but his own, and forced into a political contest which resulted in its overthrow. The experiment of 1812 was now repeated on a larger scale and with the same disastrous results. The States vied with each other in the creation of new banks, and the currency was inflated to an extent which led to reckless expenditure and speculation, ending in a suspension of specie payments, attended with a contraction which ruined every man who had large outstanding liabilities, however much his credits might exceed his debts.<sup>1</sup> These hot and cold fits were an inevitable consequence of a system which might be likened to a vessel without a rudder or a courser without reins; and although the banks which outlived the storm were at length able to redeem their notes, specie payments were again suspended in 1857. A like catastrophe followed four years later, on the outbreak of the civil war, and the government found itself compelled to exercise the supervisory and controlling power without which, as all experience shows, no artificial system of currency can be long secure. The express power to coin money and regulate the value thereof was obviously inadequate to this object in a country whose circulating medium consisted mainly of bank-notes, and recourse was had to the implied right of acting through agencies established by incorporation. The conception was borrowed from Hamilton, although in an altered form, and resulted in the creation of the national banks, which gave the uniform currency, having the same value in every corner of the country, — a value which it had not enjoyed since Hamilton's policy was discarded by Jackson.

<sup>1</sup> Bolles' Financial History of the United States, 269, 347, 350 (New York, 1883).

It was essential that the new system should have exclusive possession of the field ; and the end was attained by laying a duty of ten per cent on all bank-notes issued without the sanction of Congress, which obliged the State banks to refrain from emitting bills, or to accept a charter from the United States.<sup>1</sup> The measure was assailed as laying an impost on institutions chartered by the States, but was sustained on the ground that to put such agencies beyond the reach of the national government they must be created for purposes that are within the scope of the States, and not subject to the paramount authority of Congress. The Supreme Court declared that the currency is everywhere regarded as a matter which should be regulated by the sovereign, and was intrusted in this country to the General Government; and Congress might therefore employ any of the enumerated powers to give a uniform value to the paper money, which had for most purposes superseded the gold and silver contemplated by the framers of the Constitution, and insure its redemption when presented. Such was the view taken in *The Veazie Bank v. Fenno*<sup>2</sup> where Chief-Justice Chase held the following language in delivering judgment: "It cannot be doubted but under the Constitution the power to provide a circulation of coin is given to Congress, and it is settled by the uniform practice of the government and by repeated decisions that Congress may constitutionally authorize the emission of bills of credit. It is not important here to decide whether the quality of legal tender in payment of debts can be constitutionally imparted to these bills ; it is enough to say that there can be no question of the power of the government to emit them, to make them receivable in payment of debts to itself, to fit them for use by those who see fit to use them in all the transactions of commerce, to provide for their redemption, to make them a currency uniform in value and description, and convenient and useful for circulation. These powers, until recently, were only par-

<sup>1</sup> *Loan Association v. Topeka*, 20 Wallace, 655.

<sup>2</sup> 8 Wallace, 533.

tially and occasionally exercised. Lately, however, they have been called into full activity, and Congress has undertaken to supply a currency for the entire country. The methods adopted for the supply of this currency were briefly explained in the first part of this opinion. It now consists of coin, of United States notes, and of the notes of the national banks. Both descriptions of notes may be properly described as bills of credit, for both are furnished by the government, both are issued on the credit of the government, and the government is responsible for the redemption of both primarily as to the first description, and immediately upon default of the bank as to the second. When these bills shall be made convertible into coin at the will of the holder, this currency will perhaps satisfy the wants of the community, in respect to a circulating medium, as perfectly as any mixed currency that can be devised. Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may constitutionally secure the benefit of it to the people by appropriate legislation. To this end Congress has denied the quality of legal tender to foreign coins and has provided by law against the imposition of counterfeit and base coins on the community. To the same end Congress may restrain by suitable enactments the circulation as money of any notes not issued under its own authority. Without this power indeed its attempts to secure a sound and uniform currency for the country must be futile."

For like reasons, notes issued by a State or municipal corporation, and used as a circulating medium, may be legitimately taxed by Congress;<sup>1</sup> and the principle would apply to a currency set afloat directly or indirectly in any form by a State. So a tax which would not be good merely as such, may, agreeably to the view taken in the Head-money Cases,<sup>2</sup> be sustained under the power of Congress over commerce, and to create a fund in aid of the exercise of the police power to regulate navigation.

<sup>1</sup> *National Bank v. The United States*, 101 U. S. 1.

<sup>2</sup> 112 U. S. 580.

The use of the power of taxation for the accomplishment of ends that could not be effected by direct means, is sanctioned by the tariffs which were framed under the Democratic party and its successors for the encouragement of manufactures by drawing money from the pockets of one class of the community with the view of promoting the business of other classes, and met with the approval of Madison, though carrying the doctrine of implied powers to the utmost verge contemplated by Hamilton;<sup>1</sup> and Madison gave, in a letter to Wm. Rives in the same volume, his reasons for believing that Jefferson was of the same opinion as himself.

We have seen that commerce is placed under the guardianship of Congress, and cannot be injuriously restrained or fettered by local rules or burdens; and this is as true of the power of taxation as it is of the power to enact health laws or make police regulations. Although the prohibition of duties on imports and exports does not apply to interstate commerce, and there is no rule with regard to railroad trains and locomotives answering to that which forbids tonnage duties, a State cannot directly or indirectly tax the importation of goods from another State, nor the tolls or freight due or collected for their carriage.<sup>2</sup> Hence a ferry which is used as a means of communication between two States, and sleeping-cars, which are used in carrying passengers through a State and out of it, are not subject to State taxation;<sup>3</sup> and the principle applies to an act taxing "all telegraphic messages" carried within the borders of a State, and consequently including telegrams sent to or from other States, because a telegraph company occupies the same relation to the carriage of messages that a railroad company does to the carriage of goods.<sup>4</sup>

The principle was applied in the case of *The State Freight Tax*,<sup>5</sup> reversing the decision of the court below

<sup>1</sup> Madison to Richard Rush, 4 Madison's Writings, 5, 7, 243.

<sup>2</sup> *State Freight Tax*, 15 Wallace, 232.

<sup>3</sup> *The Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Pickard v. The Pullman Southern Car Co.*, 117 Id. 34; *Wabash R. R. Co. v. Illinois*, 118 Id. 557, 375.

<sup>4</sup> *Telegraph Co. v. Texas*, 105 U. S. 460.

<sup>5</sup> 15 Wallace, 232.

in *The Commonwealth v. The Erie Railroad Co.*<sup>1</sup> "Why," said Strong, J.,<sup>2</sup> "is not a tax upon freight transported from State to State a regulation of interstate transportation, and therefore a regulation of commerce among the States? Is it not prescribing a rule for the transporter by which he is to be controlled in bringing the subjects of commerce into the State and in taking them out? The present case is the best possible illustration. The legislature of Pennsylvania has in effect declared that every ton of freight taken up within the State and carried out, or taken up in other States and brought within her limits, shall pay a specified tax. The payment of that tax is a condition upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other States would be rendered impossible. The same power that may impose a tax of two cents per ton upon coal carried out of the State, may impose one of five dollars. Such an imposition, whether large or small, is a restraint of the privilege or right to have the subject of commerce pass freely from one State to another without being obstructed by the intervention of State lines."<sup>3</sup>

A tax on the capital or general receipts of a railway, tow-boat, or steamship company is not within this principle, although a large part of its business consists in the transportation of goods through or into the State, because the presumption is that the burden will be equal, and not bear more heavily on the products of other States than on those of domestic origin.<sup>4</sup> So a State may, agreeably to the language held in some instances, regulate the rates for transportation within a State, although the effect is to enhance the price of freight or passage beyond her limits.<sup>5</sup> But these dicta may now be

<sup>1</sup> 62 Pa. St. 286.

<sup>3</sup> See *Coe v. Errol*, 116 U. S. 527.

<sup>2</sup> 15 Wallace, 232.

<sup>4</sup> *State Railway Tax*, 15 Wallace, 284; *Moran v. New Orleans*, 112 U. S. 69, 74.

<sup>5</sup> *Peik v. The Chicago R. R.*, 94 U. S. 164.

regarded as overruled by the judgment in *The Wabash R. R. Co. v. Illinois*.<sup>1</sup>

The rule that commerce among the States cannot be subjected to local restraints which would subvert the uniformity which the Constitution contemplates, may also be violated by charging the sale of goods from another State with a greater burden than that laid where domestic products are concerned, or exacting a higher license fee from non-residents than residents;<sup>2</sup> and in *Welton v. Missouri*,<sup>3</sup> a Missouri law requiring persons dealing in merchandise grown or manufactured without the State to pay for and take out a license, while the sale of wares made within the State was left free, was held to be invalid, as contravening this principle. The court said that the true inference from the omission of Congress to legislate with regard to interstate commerce was not that it might be regulated by the States, but that it should be unrestricted.

It results from the same principle that a law taxing goods bought from another State and exposed for sale is *prima facie* unconstitutional. If, however, it appears that goods of the same kind made within the State are in fact taxed at the same rate, although in different terms and by another statute, the presumption is rebutted, and both imposts will be good. In like manner a State cannot impose any tax that will operate as a restraint on foreign commerce. The question arose in *Henderson v. The Mayor of New York*,<sup>4</sup> where the court said that the judgment in *The City of New York v. Miln*<sup>5</sup> simply determined that requiring the master of a vessel to furnish a catalogue of his passengers, with a correct description of their names, ages, occupations, places of birth, and of their last legal settlement, was a police regulation within the powers of the State, and not inconsistent with the Constitution of the United States. On the other hand, it had been adjudged in the *Passenger Cases*,<sup>6</sup> that a tax on the master or owner of a vessel for every such passenger was a regulation of commerce by the

<sup>1</sup> 118 U. S. 557, 567.

<sup>2</sup> *Ward v. Maryland*, 12 Wallace, 418.

<sup>3</sup> 91 U. S. 275.

<sup>4</sup> 92 U. S. 259.

<sup>5</sup> 11 Peters, 103.

<sup>6</sup> 7 Howard, 283.

State in conflict with the Constitution and laws of the United States, and therefore void.

The validity of such statutes depended not so much on their literal import as on the effect which they were calculated to produce. A law imposing a burdensome and almost impracticable condition on the shipmaster as a pre-requisite to landing his passengers, with an alternative payment of a small sum of money for each one of them, was a tax on the shipowner for the right to land such passengers, and virtually on the passenger himself, because the master would presumably make him pay it in advance as part of his fare. Such an enactment was a regulation of commerce which could not be made consistently with the exclusive power of Congress over the same subject. If, as had been contended, the regulation fell within the police power of the States, still that power could not be so exercised as to impair any power which was vested in the General Government. The court did not decide whether or not a State may, in the absence of legislation by Congress on the subject, pass a statute strictly limited to defending itself against paupers, convicted criminals, and other persons of that class, but was of opinion that to Congress rightfully and appropriately belongs the power of legislating on the whole subject.

Goods passing through a State on their way to another State or foreign country are within the commercial power of the United States and cannot be taxed by the State, although the transit is temporarily arrested or delayed by accidental causes;<sup>1</sup> and such also is the rule as to passengers.<sup>2</sup> But it does not apply to goods deposited in a State on their way through it to another State, although the owner intends them for exportation.<sup>3</sup>

The cases afford ground for the following inferences:

1st. The States cannot enact any law that will operate as a tax on imports from abroad while they are in the importer's hands and held by him for commercial purposes; but this rule

<sup>1</sup> *Hall v. De Cain*, 116 U. S. 485; *Coe v. Errol*, 116 U. S. 517, 528.

<sup>2</sup> *Crandall v. Nevada*, 6 Wallace, 35; *post*, p. 470.

<sup>3</sup> *Coe v. Errol*, 116 U. S. 517, 528.

is intended for the protection of commerce with foreign nations, and will not be carried further than the end requires. Therefore it does not apply to goods which have been sold by the importer, nor to those which he retains for his own use. The clock on a man's mantelpiece, the carriage which he drives or lets, and the watch which he wears, are therefore equally liable to taxation, whether they are imported or acquired in any other way. In determining such questions the court will have regard to the effect of the law rather than to its form, and an act providing that every one who sells imported goods shall pay for and obtain a license, will be regarded as a tax on the goods themselves.

2d. Imports from other States are subject to local taxation, although it must not be unequal, or impose a greater burden than that borne by the products of the State which lays the tax. There are two rules,—one that the States shall not so tax imports as to impede foreign commerce; the other, that a State shall not by taxation or otherwise place the products of a sister State in a less advantageous position than her own. The former precludes taxation until the goods have been disposed of by the importer or are no longer held by him as articles of commerce; the latter where the tax is in effect the discrimination which the Constitution prohibits.

3d. Importation from other States cannot be taxed, although the imports may; and hence a State cannot require a sum certain to be paid for every ton or hundredweight of goods brought into the State. And a tax on the freight paid for the carriage of such goods would be equally invalid.

The second section of the fourth article of the Constitution, which provides that the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States, may also operate as a restraint on the States by precluding the imposition of any tax that will operate unequally on the citizens of another State by subjecting them to a greater burden than that borne by the citizens of the State which lays the tax;<sup>1</sup> and it is immaterial that the

<sup>1</sup> The State v. Furbush, 72 Me. 193; The State v. North, 27 Mo. 464.

tax is also an exercise of the police power and designed to regulate or prevent the sale of intoxicating liquors.<sup>1</sup> A State cannot, therefore, exact a larger sum from the inhabitants of a sister State for the privilege of selling goods, issuing policies of insurance, or pursuing any other trade or calling, than it demands from its own citizens. The question arose in *Ward v. The State of Maryland*,<sup>2</sup> where a law of Maryland providing that non-residents should not make sales within the State without paying for and obtaining a license, and making a neglect or violation of the act a penal offence punishable by fine and imprisonment, was held to contravene this rule.

It was decided on like grounds in *Guy v. Baltimore*<sup>3</sup> that an ordinance requiring vessels laden with the products of other States, to pay a larger sum for the use of the public wharves of Baltimore than that exacted where the cargo consisted of articles grown or made in Maryland, was in conflict with the Constitution of the United States. Such fees must be regarded, not as a compensation for the use of the city property, but as a mere expedient or device to foster the domestic commerce of the State at the expense of the other members of the United States. Although the power of the General Government does not extend to the purely internal commerce of a State, it may be exerted within the State to protect the products of other States and countries from an injurious discrimination founded on their origin.

I may repeat what has been elsewhere stated, that corporations chartered by other States are not citizens within the meaning of the clause, and may consequently be taxed at a higher rate than that imposed on individuals or companies chartered by the legislature which lays the tax, or more accurately be required to pay a license fee for the privilege of transacting business within the State and enjoying the protection of its laws.<sup>4</sup>

<sup>1</sup> *Walling v. Michigan*, 116 U. S. 446, 457.

<sup>3</sup> 100 U. S. 434.

<sup>2</sup> 12 Wallace, 418.

<sup>4</sup> *Paul v. Virginia*, 8 Wallace, 168; *Philadelphia Transportation Association v. New York*, 119 U. S. 110.

## LECTURE XVII.

General Principles of Taxation. — Distinction between Taxation and Confiscation. — Illegality of a Tax not levied for a Public Purpose. — Unequal Burdens of a Protective Tariff. — Legislative Appropriation of Money raised by Taxation for the Benefit of Individuals. — Difficulty of defining Public Purposes. — Industrial Enterprises. — Aiding the Inhabitants to rebuild a Town destroyed by Fire. — Repayment of Debts incurred by Individuals for Public Purposes. — Schools, Almshouses, and Hospitals. — Pensions. — Dikes. — Irrigation. — Drainage. — Uniformity essential to Taxation. — Classification for Purposes of Taxation a Legislative Function. — Taxation of the Whole for the Benefit of a Part. — Municipal Taxation of Rural Property for Urban Improvements. — Taxation of a Part for the Benefit of the Whole. — Assessment of Damages for opening Streets. — Taxation in Proportion to Benefit, the True Rule of Apportionment. — The Ascertainment of the Benefit. — Taxation of Railway or Municipal Bonds held by Non-residents. — Concurrent Taxation by the States and the United States.

TAXATION has been defined as the subtraction of a small portion of the constantly accumulating mass of private property for the purpose of the government by which the tax is imposed, and is distinguished from confiscation by the end in view, which is to provide for the defence, security, and welfare of the community, including the persons who pay the tax. Agreeably to the Fifth Amendment and the organic laws of the various States, "Private property shall not be taken for public use without just compensation." Taxation is such a taking, and would be at variance with these guaranties but for the presumption that the citizen is benefited through the appropriation of the money raised by the tax in some just proportion to the sum which he is compelled to pay.<sup>1</sup> It follows

<sup>1</sup> *Hammett v. Philadelphia*, 65 Pa. St. 146, 152; *Kelly v. The City of Pittsburg*, 85 Pa. St. 170, 184; *Lexington v. McQuillan*, 9 Dana, 513; *Tidewater Co. v. Coster*, 3 C. E. Green, 518; *The People v. The Mayor of Brooklyn*, 4 Comstock, 419, 424; *Livingston v. Paducah*, 80 Ky. 656.

that when the proceeds are by the terms of the act to be appropriated to a private purpose, — as where an act of assembly required insurance, trust, and annuity companies to pay two per cent of their gross earnings to an association for the relief of disabled firemen, — the presumption is rebutted, and the tax illegal.

Such a measure may be termed “taxation,” but is in effect taking the property of one man to bestow it on another, and contrary to the fundamental rule that no one shall be deprived of life, liberty, or property, save by the judgment of his peers or the law of the land.<sup>1</sup> Had the tax been for the support of a fire department, it would have been valid, as tending to an end in which the insurance companies and the community were alike interested; but charity to disabled firemen is no more a public use than if it were bestowed on sufferers of any other class.<sup>2</sup>

To warrant taxation, the purpose must consequently not only be beneficial, but concern the public. A merely private benefit is not enough, although conferred upon the parties who oppose the tax and affording an ample compensation; because under a free government, when no public considerations are involved, every man should be allowed to choose for himself. An act authorizing commissioners to construct the dikes, flood-gates, ditches, and other works requisite for draining a marsh or bog at the expense of the owners, without inquiring whether the undertaking is demanded by, or conducive to, the welfare or health of the community, is therefore not less unconstitutional, if viewed merely as a tax, because the benefit will more than repay the debt.<sup>3</sup>

So the legislature cannot authorize a municipal corporation to issue bonds for the purpose of lending them to persons engaged in manufacturing within its limits, because such a grant implies the right and duty to tax as a means of pay-

<sup>1</sup> *Philadelphia Association v. Wood*, 39 Pa. 73; *Weber v. Reinhard*, 73 Pa. 370, 373; *Butler v. Supervisors*, 26 Mich. 29.

<sup>2</sup> *Parkersburg v. Brown*, 106 U. S. 487, 501.

<sup>3</sup> *Scott v. Philadelphia*, 81 Pa. 80; *Butler v. The Supervisors*, 26 Mich. 29. See *Wurtz v. Hoagland*, 114 U. S. 606; *post*, p. 289.

ment; and the bonds will consequently be invalid if the defect is apparent, even in the hands of a purchaser for value.<sup>1</sup>

A tax, as defined in Webster's Dictionary and by the Supreme Court of the United States, is "a burden imposed by the legislature on persons or property for public purposes," and no tax which manifestly contravenes this principle can be valid.<sup>2</sup> The power is nevertheless plenary as to objects within its scope, and one as to which the decision of the legislature is conclusive, unless the line is passed at which the abuse of authority becomes a usurpation or excess.<sup>3</sup> If the project has in it an element of public utility, the question how much, and whether it will outweigh the disadvantages or repay the cost, cannot be reconsidered by the judiciary, — save, it may be, where the disproportion is so gross as to be indisputable, and warrant the belief that the real object is private, and the general good a mere pretext or cover.<sup>4</sup> Such is the established rule as to the analogous right of eminent domain, and it applies to the power to tax.<sup>5</sup>

If the end be not public, it matters not that the individuals for whose benefit the tax is laid are numerous, nor that the object is to afford relief from the consequences of a pestilence, fire, inundation, or other general and wide-spread calamity. Soon after a disastrous fire, which laid a large part of the business quarter of Boston in ashes, the Governor of Massachusetts convened the legislature to devise measures in aid of the city and its inhabitants; and a law was passed authorizing the city councils to issue bonds to the amount of twenty millions of dollars, and loan them to the persons whose buildings had

<sup>1</sup> *Loan Association v. Topeka*, 20 Wallace, 655; *Parkersburg v. Brown*, 106 U. S. 487, 501; *Cole v. La Grange*, 113 U. S. 46.

<sup>2</sup> *Loan Association v. Topeka*, 20 Wallace, 655; *Butler v. The Supervisors*, 26 Mich. 29.

<sup>3</sup> *Loan Association v. Topeka*, 20 Wallace, 655; *Sigler v. Fuller*, 5 Vroom (N. J.), 227; *Agurs v. The Mayor*, 6 Vroom (N. J.), 172; *Sharpless v. Mayor of Philadelphia*, 21 Pa. St. 147.

<sup>4</sup> *Tidewater Co. v. Coster*, 3 C. E. Green, 518, 524; *Sigler v. Fuller*, 5 Vroom, 227.

<sup>5</sup> 2 Kent's Comm. 340; *Cottrill v. Myrick*, 3 Fairfield, 222; *Beekman v. The Saratoga R. R. Co.*, 3 Paige, 73.

been consumed, to assist them in rebuilding. The law was held to be unconstitutional, as empowering the city to contract an obligation which would necessitate taxation for a purpose which was not less private because there were a great number of recipients, and the money was to be expended in a way that would be indirectly advantageous to the community which paid the tax.<sup>1</sup>

It was decided on like grounds in *Weisner v. The Village of Douglass*<sup>2</sup> that the legislature could not empower a municipal corporation to issue bonds for the amount of its subscription to a company which had been incorporated by the State with authority to erect a dam across the Delaware and use the water-power so obtained for manufacturing lumber and other raw materials. The use was private, although it tended to promote the growth and prosperity of the town, and might therefore in common parlance be termed public. So a municipal corporation cannot be authorized to tax the citizens for the support of a school, hospital, or library, although its doors are open to the public and a great number of persons will participate in the advantages which it confers, unless it is a public agency, or controlled and managed by the State.<sup>3</sup>

The power would seemingly be limited, though there were no express prohibition. It is inherent in the idea of taxation that it should be for the public good; and a law taxing one set of men for the benefit of another, or in furtherance of an industrial enterprise in which they were engaged, would be regarded as confiscation in all civilized countries. As was well observed in *The Loan Association v. Topeka*,<sup>4</sup> "to lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under

<sup>1</sup> *Lowell v. Boston*, 111 Mass. 454; *Loan Association v. Topeka*, 20 Wallace, 655.

<sup>2</sup> 64 N. Y. 91.

<sup>3</sup> *Jenkins v. Andover*, 103 Mass. 94; *Curtis' Adm'r v. Whipple*, 24 Wis. 350; *Whiting v. Sheboygan and Fond du Lac R. R. Co.*, 25 Id. 188.

<sup>4</sup> 20 Wallace, 655.

the forms of law and is called taxation. Such an enactment is not legislation; it is a decree under legislative forms."<sup>1</sup>

It is easier to point out the evils that may result from a misuse of taxation than to provide a remedy. No government will avowedly tax one class or section for the sake of benefiting another, because the end may be attained in other ways. Congress could not require cloth-manufacturers to pay a percentage on their capital or profits to the producers of native wool; but such a burden may be, and is in effect, imposed by laying duties on foreign wool. So railway companies may virtually be assessed for the benefit of ironmasters by a prohibitory duty on foreign steel, or the manufacturers of white paint in Pennsylvania be compelled to bear the expense of bringing lead overland from Iowa by a tariff on that produced abroad.

<sup>1</sup> "The general grant of legislative power in the Constitution of a State," said Gray, J., in *Cole v. La Grange*, 113 U. S. 16, "does not enable the legislature, in the exercise either of the right of eminent domain or of the right of taxation, to take private property without the owner's consent for any but a public object. Nor can the legislature authorize counties, cities, or towns to contract for private objects, debts which must be paid by taxes. It cannot, therefore, authorize them to issue bonds to assist merchants or manufacturers, whether natural persons or corporations, in their private business. These limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject.

"In *The Loan Association v. Topeka*, 20 Wallace, 655, the bonds of a city, issued, as appeared on their face, pursuant to an act of the legislature of Kansas, to a manufacturing corporation to aid it in establishing shops in the city for the manufacture of iron bridges, were held by this court to be void, even in the hands of a purchaser in good faith and for value.

"The decisions in the courts of the States are to the same effect. *Allen v. Jay*, 60 Me. 124; *Lowell v. Boston*, 111 Mass. 454; *Weisner v. Douglass*, 64 N. Y. 91; *In re Eureka Co.*, 96 N. Y. 42; *Bissell v. Kankakee*, 64 Ill. 249; *English v. The People*, 96 Ill. 566; *Central Branch Union Pacific R. v. Smith*, 23 Kan. 745.

"We have been referred to no opposing decision. The cases of *Hackett v. Ottawa*, 99 U. S. 86, and *Ottawa v. National Bank*, 105 U. S. 342, were decided, as the Chief-Justice pointed out in *Ottawa v. Carey*, 108 U. S. 110, 118, upon the ground that the bonds in suit appeared on their face to have been issued for municipal purposes, and were therefore valid in the

The abuse, if it be such, must nevertheless be endured, as incident to a power so indispensable and far reaching as taxation, which would be seriously impaired were it subjected to constitutional restraints, and an appeal made to the judiciary whenever they are alleged to have been evaded by employing it for an object that is prohibited, and would be illegal if disclosed.<sup>1</sup> Redress may be given in court for an excess or usurpation of power, but there is no remedy for its abuse save through an impeachment, or at the polls.<sup>2</sup>

There is, moreover, this difficulty in the practical application of the principle which forbids taxation for private ends, that the legislature may appropriate the money in the treasury for objects of charity or beneficence, though not in the nature of a public use. Conceding that a municipal corporation cannot effect a loan or levy taxes to assist the citizens in rebuilding dwellings that have been destroyed by fire, it does

hands of *bona fide* holders. In *Livingston v. Darlington*, 101 U. S. 407, the town subscription was towards the establishment of a State reform-school, which was undoubtedly a public purpose; and the question in controversy was whether it was a corporate purpose within the meaning of the Constitution of Illinois. In *Burlington v. Beasley*, 94 U. S. 310, the grist-mill held to be a work of internal improvement, to aid in constructing which a town might issue bonds under the statutes of Kansas, was a public mill which ground for toll for all customers. See *Osborne v. Adams Co.*, 106 U. S. 181, and 109 U. S. 1; *Blair v. Cuming*, 111 U. S. 363.

"Subscriptions and bonds of towns and cities, under legislative authority to aid in establishing railroads, have been sustained on the same ground on which the delegation to railroad corporations of the sovereign right of eminent domain has been justified,—the accommodation of public travel. *Rogers v. Burlington*, 3 Wallace, 654; *Queensburg v. Culver*, 19 Wallace, 83; *Loan Association v. Topeka*, 20 Wallace, 661, 662; *Taylor v. Ypsilanti*, 105 U. S. 60.

"Statutes authorizing towns and cities to pay bounties to soldiers have been upheld, because the raising of soldiers is a public duty." *Middleton v. Mullica*, 112 U. S. 433; *Taylor v. Thompson*, 42 Ill. 9; *Hilbish v. Catherman*, 64 Pa. St. 154; *State v. Richland*, 20 Ohio St. 362; *Agawam v. Hampden*, 130 Mass. 528, 534; *Cole v. La Grange*, 113 U. S. 1, 6.

<sup>1</sup> The *Loan Association v. Topeka*, 20 Wallace, 664.

<sup>2</sup> The *Hospital v. Philadelphia*, 29 Pa. St. 229; *Stinger v. The Commonwealth*, 26 Pa. St. 426; *Hughes v. Kline*, 30 Pa. St. 227; *Clinton School District's Appeal*, 56 Pa. St. 315.

not follow that the Commonwealth may not lend its aid for such purposes, or that such an expenditure could be stayed by an injunction in the absence of an express constitutional prohibition.

Massachusetts is so far an exception that the revenue cannot constitutionally be applied to any object that is not public in the legal sense of the term, and an injunction might seemingly be granted if such an attempt were made. The words are that "the appropriation of money from the treasury shall be for the necessary defence and support of the Commonwealth, and the protection and preservation of the inhabitants thereof," which impliedly excludes merely private uses. A grant of money or property acquired by taxation, or through the exercise of the right of eminent domain, to an individual for his private use would clearly transcend the authority of the legislature as defined in *Lowell v. Boston*.<sup>1</sup>

What constitutes a public use cannot easily be defined either as regards taxation or the cognate right of eminent domain; but we may say in general that it must be something which is beneficial to the community, and through it to individuals, and not merely to individuals and through them to the community.<sup>2</sup> Every industrial enterprise which gives employment to labor and adds to the wealth of the State is a public good; but it is not therefore necessarily a public use for which taxes may be laid or land taken.<sup>3</sup>

In *The Loan Association v. Topeka*,<sup>4</sup> the question arose under a statute authorizing the city of Topeka to issue bonds for the purpose of aiding a manufacturing company in establishing workshops within the city, which was declared to be invalid by the Supreme Court of the United States. The court held that there was no such public purpose as would justify the imposition of a tax. If, as was contended, a great manufactory would be a local benefit, the same might be said

<sup>1</sup> *Lowell v. Boston*, 111 Mass. 454.

<sup>2</sup> *Butler v. The Supervisors*, 26 Mich. 29.

<sup>3</sup> *Loan Association v. Topeka*, 20 Wallace, 655; *Parkersburg v. Brown*, 106 U. S. 487; *Cole v. La Grange*, 113 Id. 4.

<sup>4</sup> 20 Wallace, 656.

of any occupation or pursuit which employed capital and labor. Commerce, agriculture, hotel-keeping, and the various trades were alike meritorious as tending to promote the general welfare, and no argument could be made in favor of the manufacturer that might not be urged with as much force on behalf of the majority of the business men in the community. The power to tax was, as Chief-Justice Marshall had observed in *McCulloch v. Maryland*,<sup>1</sup> a power to destroy. The State banks had been taxed out of existence by the General Government; and taxation, if not confined to public purposes, might be so used as to serve one class at the expense of another. The statute did not expressly authorize taxation, but an authority to borrow money carried with it an implied authority to levy the taxes which are requisite for its repayment. An analogous ordinance was considered in *Allen v. The Inhabitants of Jay*,<sup>2</sup> and with the same result. And such also was the decision in *Cole v. La Grange*.

In like manner, while money cannot be better employed than in aiding the inhabitants of a town that has been devastated by fire to rebuild their dwelling-houses and shops, there is still no such public use as will justify taxation by the corporation, or, as we may infer, by the Commonwealth. Such, as we have seen, was the decision in *Boston v. Lowell*,<sup>3</sup> and it was cited and approved in *The Loan Association v. Topeka*.<sup>4</sup>

Schools, almshouses, and hospitals occupy an intermediate position, and may be public or private uses, according to circumstances. When controlled by the Commonwealth, and open to all who need such aid, they are public uses, and may be endowed and sustained by taxation; but it cannot properly be employed for the support of any institution, however admirable or useful, which is in the hands of private persons who are not accountable to the government.<sup>5</sup> A school established with money bequeathed by will, and governed by trustees appointed in the mode prescribed by the testator, is accordingly a private enterprise that cannot legitimately be

<sup>1</sup> 4 Wheaton, 431.

<sup>3</sup> 111 Mass. 454.

<sup>2</sup> 60 Me. 124.

<sup>4</sup> 20 Wallace, 656.

<sup>5</sup> *St. Mary's Industrial School*, 45 Md. 316.

aided by taxation, whether imposed directly or through the agency of a municipal corporation ; and the same point may be found in *Curtis, Adm'r v. Whipple*.<sup>1</sup>

It has been held in various instances that when a payment is made or obligation incurred on behalf of the community for an end in which it is interested, and which might have been legitimately provided for by taxation, the obligation is so far public that it may be adopted by the State, and a tax laid as a means of indemnity or reimbursement.<sup>2</sup> These decisions proceed on the ground that a ratification is equivalent to a command, which applies to the Commonwealth as well as to individuals.

To call this principle into operation, the obligation must nevertheless have been incurred for and on account of the party by whom it is assumed. A man cannot make a debt contracted by another his own by promising to pay it, although the consideration moved to him or he was benefited by the contract ; and it is not less plain that a benefit voluntarily conferred without a view to payment will not sustain a subsequent promise of compensation.<sup>3</sup>

The legislature therefore cannot authorize or uphold taxation by a town or borough for the payment of bounties or premiums to soldiers who have entered into the service without any stipulation or agreement to that effect,<sup>4</sup> nor can such a tax be laid to reimburse one or more persons for the amount which they have expended individually or collectively to procure substitutes, and save themselves from being drafted, although the effect of what they did was to fill the quota of the borough, and incidentally benefit the public.<sup>5</sup> It has notwithstanding been decided that the power of taxation may be employed retrospectively to repay individuals who have

<sup>1</sup> 24 Wis. 350.

<sup>2</sup> *Warden v. Commissioners*, 38 Ohio St. 639; *Thomas v. Leland*, 24 Wend. 65; *Weister v. Hade*, 52 Pa. St. 474; *Speer v. The School Directors*, 50 Pa. St. 150.

<sup>3</sup> 2 American Leading Cases, 163, 5th ed.

<sup>4</sup> *Washington City v. Berwick*, 56 Pa. St. 466.

<sup>5</sup> *Tyson v. The School Directors*, 1 Pa. St. 9.

advanced money, or incurred an obligation for a public object, although they did not act professedly on behalf of the community, or expect to be reimbursed.<sup>1</sup>

In *Thomas v. Leland*<sup>2</sup> several persons covenanted to contribute to the cost of a canal then in process of construction by the State, if the terminus were fixed at the city in which they lived; and it was held that the city might be taxed to exonerate them and fulfil the covenant.

The difference between this case and *Tyson v. The School District* seems to be that while the obligation was private in both cases, it was contracted in the former for a public use, and might therefore be assumed by the legislature. Such at least appears to be the only way of reconciling cases that are too far apart to be easily brought together. Strictly speaking, an act cannot be ratified simply because it is beneficial, nor unless it is done on behalf of the party who ratifies the act.

In determining for what objects taxation can properly be employed, regard may be had to the practice of the government as tacitly ratified by the acquiescence of the people; and uses that have customarily been treated as public in England and the United States by successive legislatures, may be presumed to deserve the character which they have so long borne, unless they are manifestly at variance with the letter and spirit of the Constitution.<sup>3</sup> If the end be public, it matters not that it is attained through a private channel; and municipal bonds may be issued and taxes laid in aid of a railway passing near or through a town, on the principle which sustains the Commonwealth in the exercise of the right of eminent domain, — that the object is the furtherance and accommodation of public travel.<sup>4</sup> So grist-mills open to all on the payment of tolls, though owned and worked by individuals as a means of gain, are, it seems, — at all events

<sup>1</sup> *Thomas v. Leland*, 24 Wend. 65; *Warder v. Commissioners*, 38 Ohio, 639.

<sup>2</sup> 24 Wend. 65.

<sup>3</sup> *The Loan Association v. Topeka*, 20 Wallace, 655.

<sup>4</sup> *Sharpless, Philadelphia, Harris, Queensburg v. Culver*, 19 Wallace, 183; *Taylor v. Ypsilanti*, 105 U. S. 60.

when propelled by water obtained through a dam across a stream — within the rule;<sup>1</sup> which also applies to bounties paid to soldiers in time of war.<sup>2</sup>

I may add that, in the instances which have been cited to show that taxation cannot be employed unless the object is strictly public, the burden was laid specifically on a locality or class, contrary to the rule that such a tax cannot be levied unless there is a special benefit to justify the inequality. It does not, therefore, follow that if Congress or a State legislature were of opinion that pensioning persons who have deserved well of their country in science, literature, or art, or been disabled in her service, would “promote the general welfare,” and proceeded to raise the money by taxation, their decision could be reversed, and the law pronounced unconstitutional. Such is, in fact, the established practice of the General Government as regards persons who have served in the army or navy; and the principle would seem to have no limit but the discretion of the legislature.

Agreeably to the view taken in many instances, the owners of meadow or marsh lands may be specifically assessed for the construction of the dikes, sluices, flood-gates, etc., requisite for drainage or to exclude the waters of an adjacent sea or river, in the ratio or proportion in which their properties are respectively benefited by the work.<sup>3</sup> Such taxation would seem to rest on the undoubted right of the legislature to adopt measures which are at once locally beneficial to individuals and conducive to the general good, and apportion the cost among the parties interested in proportion to the benefit. The government may obviously, as in Holland, erect dikes to prevent the influx of the sea, or to guard, as in Lombardy or Louisiana, against the overflow of a

<sup>1</sup> *Burlington v. Beasley*, 94 U. S. 310; *Blair v. Cuming*, C. J. 111 Id. 363. See as to steam grist-mills, *Osborne v. Adams*, C. J. 106 U. S. 181, 109, and *Burlington v. Beasley*, 94 U. S. 310.

<sup>2</sup> *Helbush v. Catherman*, 64 Penn. 154; *Agawam v. Hampden*, 130 Mass. 528; *Cole v. La Grange*, 113 U. S. 1, 7.

<sup>3</sup> *The Tidewater Co. v. Coster*, 3 C. E. Green, 54, 518; *Davidson v. New Orleans*, 96 U. S. 97; *Reeves v. Wood Co.*, 8 Ohio St. 333.

river.<sup>1</sup> And there is an obvious analogy between such works and those designed to afford a vent to the superfluous water which renders an extensive marsh unfit for cultivation, or a source of disease.<sup>2</sup> The necessity may be greater in one case than in the other; but there is an element of public utility in both, and it is for the legislature to judge of the degree, and whether the project is wise in the case in hand. In such instances the power of taxation and the power of eminent domain are both called into play, — the latter to charge the land with an easement in the shape of dikes or drains; the former to apportion the cost in the ratio of the benefit.

The doctrine is clearly stated in the following extract from the judgment in *Reeves v. Wood County*. “The exercise of certain powers of government,” said the court, “is often imperiously demanded by peculiar topographical and climatic conditions. In Holland, nearly the whole surface of which is lower than the sea at high tide, the regulation of dikes and drains becomes a necessary function of government. So does the matter of irrigation in Egypt, Peru, and some other countries. It is notorious that a large district in the northwest portion of this State, not less probably than one sixth the whole, and possessing elements of unsurpassed fertility, while it is sufficiently elevated above Lake Erie on the one side, and the basin of the Ohio River on the other, and almost everywhere with sufficient inclination in some direction readily to carry off its surplus waters if there were channels for its conveyance, has yet such an unbroken surface, and is so destitute of ravines and natural channels, as to render the appellation of ‘Black Swamp’ appropriate and familiar, and the district proverbial — more so, probably, than it really deserves — for dampness, miasm, and disease. To this large district, capable of transformation, and in fact now being rapidly transformed, into a region at once healthful and pro-

<sup>1</sup> *Davidson v. New Orleans*, 96 U. S. 97; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495; *Crowley v. Copley*, 2 La. An. 329; *Wallace v. Shelton*, 14 Id. 498; *Rutherford’s Case*, 72 Pa. St. 82; *Philadelphia v. Scott*, 81 Pa. St. 80.

<sup>2</sup> *Reeves v. Wood County*, 8 Ohio St. 343.

ductive, drains are a necessity. They must often be several miles in extent, and laid out with reference to some general plan. It is easy to see that the execution of these works is beyond the power of isolated individual effort, and that the public authority must be invoked to prescribe the location and plan, and thus to overrule the conflicts of individual opinion and individual selfishness. It is certainly possible to execute these necessary works by means of assessments upon property in proportion to benefits received, and thus to secure results more equitable to individuals than could be obtained in any other way or by any other system of taxation. Looking, therefore, to the urgent necessity for the exercise of this power, however cogent may be the considerations which address themselves to the legislature to induce that body carefully to guard against its abuse, I can see no cause to regret, and no argument against, its existence.”<sup>1</sup>

The courts of Massachusetts arrive at the same result, although on different grounds. In their judgment men whose interests are alike and are affected by the same peril stand in a relation which is analogous to that of tenants in common, and may, like it, be regulated by the legislature. Hence persons who inhabit the banks of a stream and are entitled to use its waters, and in danger when it is in flood, may be compelled to unite in the measures requisite for keeping it within due bounds; and the principle is the same where a marsh cannot be drained without concerted action and works executed on a plan embracing the entire tract.<sup>2</sup>

Such legislation may, like authorizing the sale of property which cannot be parted without spoiling the whole, or the erection of a party-wall on the boundary line of an adjacent lot, be justifiable as an exercise of the police power;<sup>3</sup> but if

<sup>1</sup> *Reeves v. Wood County*, 8 Ohio St. 343.

<sup>2</sup> *Coomas v. Burt*, 22 Pick. 422; *Talbot v. Hudson*, 16 Gray, 417; *State v. Blake*, 6 Vroom, 208, 7 Id. 442; *Lowell v. Boston*, 111 Mass. 468. See *Hoagland v. Wurts*, 41 N. J. Law, 175, 177; *Kean v. Driggs Drainage Co.*, 45 Id. 91, 94; *Head v. Amoskeag Co.*, 113 U. S. 9.

<sup>3</sup> *Wurts v. Hoagland*, 114 U. S. 606; *State v. Newark*, 3 Dutcher, 185; *Palaioret's Appeal*, 67 Pa. St. 480, 493, 498.

community of interest is analagous in this regard to community of title, — which is by no means clear,<sup>1</sup> — it does not afford a ground for charging the respective owners with an outlay made for its promotion, unless the public interest is also involved, nor except so far as they are actually and individually benefited;<sup>2</sup> and it is not less requisite that they should have notice and an opportunity to appear.<sup>3</sup>

Laws of this description have moreover been impugned as tending mainly, or at all events primarily, to enhance the value of the land concerned; and no argument is requisite to prove that a tax cannot be levied on one or on many individuals for drains constructed for private ends, and in which the community are not interested.<sup>4</sup> It is immaterial in this regard that the party who objects will be a gainer to the full amount which he is required to pay, because under a free government, when no public considerations are involved, each man should be allowed to decide for himself.<sup>5</sup>

A distinction has nevertheless been taken in New Jersey, and sanctioned by the Supreme Court of the United States, between cases where such a proceeding is authorized for the public good, and those where it is instituted on the application of the owners, or some of them, with a view to the security or improvement of property which is so situated that joint action is requisite, and none can proceed unless all concur. In the former class, individuals cannot be compelled to bear a larger share of the burden than corresponds to the benefit received by each in excess of that conferred on the community at large.<sup>6</sup> In the latter, the owners are answerable for the entire outlay, whether it does or does not exceed the benefit, just as an owner may be compelled to suffer the

<sup>1</sup> Rutherford's Case, 72 Pa. St. 85.

<sup>2</sup> *Reeves v. Wood County*, 8 Ohio St. 333; *Butler v. The Supervisors*, 26 Mich. 29; *The Tidewater Co. v. Coster*, 3 C. E. Green, 54, 518.

<sup>3</sup> Rutherford's Case, 72 Pa. St. 85.

<sup>4</sup> *Reeves v. Wood County*, 8 Ohio St. 344.

<sup>5</sup> *Butler v. The Supervisors*, 26 Mich. 29; *Philadelphia v. Scott*, 81 Pa. St. 80.

<sup>6</sup> *Coster v. Tidewater Co.*, 3 C. E. Green, 528, 531; *Kean v. Driggs Drainage Co.*, 45 N. J. Law, 91.

erection of a party-wall on his ground in aid of a building on the adjacent land, or land sold at the instance of one tenant in common against the will of the rest, if it is insusceptible of division.<sup>1</sup>

Such cases come, it has been said, under the head of the police power, as distinguished from the power of taxation or the right of eminent domain.<sup>2</sup> So viewed, they seem questionable, because the proper object of the police power is the general good, and individuals cannot be justly charged for more than the benefit conferred. A man should not be compelled to pay for an improvement which he does not desire because his neighbors think that it would be beneficial; and, notwithstanding the language of the Supreme Court of the United States in *Wurts v. Hoagland*, we may believe, as the Chief-Justice of New Jersey declared when the question was before the State tribunals, that such legislation transcends ordinary bounds, and can be sustained only as a custom which has become inveterate through general acquiescence and the lapse of time.<sup>3</sup>

It is not less clear that taxation should be so far equal that the charge on each place or person shall not be disproportionate to that laid on other persons or localities, or the benefit that will presumably result from the expenditure of the proceeds of the tax; and when its inequality appears as a conclusion of law, or as a necessary inference from the facts, the judiciary may afford redress by declaring the act unconstitutional and inoperative.<sup>4</sup> "I admit," said Agnew, C.-J., in *In re Washington Avenue*, "that the power to tax is

<sup>1</sup> *State v. Blake*, 6 Vroom, 208; 7 Id. 442; *Wurts v. Hoagland*, 114 U. S. 606, 611; *Hagar v. The Reclamation District*, 111 Id. 701; *Head v. Amoskeag Manuf. Co.*, 113 Id. 9, 21; *Davidson v. New Orleans*, 96 Id. 97; *In re Pequoit River Drainage*, 10 Vroom, 438; 12 Id. 175; 13 Id. 553; 14 Id. 456.

<sup>2</sup> *Wurts v. Hoagland*, 114 U. S. 606, 613; *State v. Newark*, 3 Dutcher, 185.

<sup>3</sup> See *Hoagland v. Wurts*, 41 N. J. Law, 175, 177; *Kean v. Driggs Drainage Co.*, 45 Id. 91, 94.

<sup>4</sup> *Livingston v. Paducah*, 80 Ky. 656; *St. Louis v. Spiegel*, 75 Mo. 145; *In re Washington Ave.*, 69 Pa. St. 352, 363.

unbounded by any express limit in the Constitution, and that it may be exercised to the full extent of the public exigency. I concede that it differs from the power of eminent domain, and has no thought of compensation by way of a return for that which it takes and applies to the public good, further than all derive benefit from the purpose to which it is applied. But, nevertheless, taxation is bounded in its exercise by its own nature, essential characteristics, and purpose. It must therefore visit all alike in a reasonably practicable way, of which the legislature may judge, but within the just limits of what is taxation. Like the rain, it may fall upon the people in districts and in towns; but still it must be public in its purpose, reasonably just and equal in its distribution, and cannot sacrifice individual right by a palpably unjust taxation. To do so is confiscation, not taxation; extortion, not assessment; and falls within the clearly implied restriction in the Bill of Rights."

An exact equalization of taxation is difficult, if not impracticable, and an attempt to enforce it through the courts would cripple, if not defeat, a power which must be exercised with some latitude in order to be effectual; but there are fixed boundaries which the legislature cannot pass.<sup>1</sup> It needs no argument to prove that in a government which is not omnipotent, and is, on the contrary, hedged in by guaranties of private rights, there can be no unlimited power to concentrate the public burdens on certain specified things, classes, or persons.<sup>2</sup>

A law imposing the entire debt of a State on a single town or county would not be a tax, but a manifest taking of private property for public use without due process of law, or the compensation which is essential to the exercise of the right of eminent domain. Such gross exactions are not likely to occur; but less may render a tax unconstitutional, and justify the issuing of an injunction. A class, individual, or locality cannot be charged with a disproportionate share

<sup>1</sup> *Lexington v. McQuillan*, 9 Dana, 513; *The Loan Association v. Topeka*, 20 Wallace, 655.

<sup>2</sup> *Agens v. The Mayor*, 37 N. J. Law, 415.

of the cost of a work done or improvement made for the general good; and whatever form such an attempt may take, it will be invalid.<sup>1</sup>

Real estate may be taxed to the exclusion of personal, or personal of real; but neither can be subjected to a different rule from that applied to other property of the same kind without some apparent reason,—as that the tax is laid by a municipal corporation for city use, and the property exempted rural. So the legislature may tax clocks, and not watches, or gold watches to the exclusion of silver, but cannot lay a tax exclusively on watches made or owned in a single town or factory, unless the proceeds are wholly used for the benefit of the persons who bear the burden. In like manner persons engaged in the same trade or calling must be taxed uniformly; and the imposition of a duty on the dealers or shopkeepers in a single quarter of a town, without some better reason than the difference of the locality, is an inequality which the Constitution does not tolerate.<sup>2</sup>

A tax is uniform within the meaning of the Constitution whenever it bears equally on the things, lands, or persons on which it is imposed, wherever they are found. If these conditions are fulfilled, it is immaterial that there are various localities where the tax is ineffectual for want of a subject-matter on which to operate. Perfect uniformity and entire equality of taxation are, it has been justly said, things which are unattainable by the legislature, and cannot be enforced by the courts.<sup>3</sup>

The clause of the Fourteenth Amendment which guarantees to every person the equal protection of the law, does not vary the rule, or require taxes to be levied uniformly upon all descriptions of property. The matter is left to the discretion of the legislative power, and there is nothing to for-

<sup>1</sup> *Hammett v. Philadelphia*, 65 Pa. St. 146; *Agurs v. The Mayor*, 35 N. J. 172, 37 Id. 415; *The Tidewater Co. v. Coster*, 3 C. E. Green, 518.

<sup>2</sup> *St. Louis v. Spiegel*, 75 Mo. 145, 147; *Durach's Appeal*, 62 Pa. St. 491.

<sup>3</sup> *The State R. R. Tax Cases*, 92 U. S. 575, 612; *Head-money Cases*, 112 Id. 580, 595.

bid the classification of property for purposes of taxation, and the valuation of different classes by different methods. What equality requires is that the same means and methods shall be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. Railway companies may consequently be ranged under a separate head, and assessed by different means from those employed in the case of other bodies corporate, because the peculiar nature of their property and of the uses to which it is applied, warrants the exercise of the discretionary power of the legislature within due bounds.<sup>1</sup>

It has also been decided that duties, which would be invalid for want of uniformity if imposed simply by virtue of the power of taxation, may nevertheless be upheld as a necessary and appropriate means of exercising the other enumerated powers; as, for instance, that over the currency or to regulate commerce.<sup>2</sup>

"If," said Miller, J., in the Head-money Cases, "this is an expedient regulation of commerce by Congress, and the end to be attained is one falling within the power, the act is not void, because, within a loose and more extended sense than was used in the Constitution, it is called a tax. In the case of *Veazie Bank v. Fenno*, the enormous tax of eight per cent *per annum* on the circulation of State banks, which was designed, and did have the effect, to drive all such circulation out of existence, was upheld because it was a means properly adopted by Congress to protect the currency which it had created; namely, the legal-tender notes and the notes of the national banks. It was not subject, therefore, to the rules which would invalidate an ordinary tax pure and simple. So also in the case of the *Packet Co. v. Keokuk*,<sup>3</sup> the city of Keokuk having by ordinance imposed a wharfage fee or tax for the use of a wharf owned by the city, the

<sup>1</sup> The Kentucky R. R. Tax Case, 105 U. S. 321.

<sup>2</sup> *Veazie Bank v. Fenno*, 8 Wallace, 533; Head-money Cases, 112 U. S. 580, 596.

<sup>3</sup> 95 U. S. 80.

amount of which was regulated by the tonnage of the vessel, this was held not to be a tonnage tax within the meaning of the Constitutional provision that no State shall, without the consent of Congress, lay any duty on tonnage. The reason of this is, that though it was a burden or tax in some sense, and measured by the tonnage of the vessel, it was but a charge for services rendered or for conveniences furnished by the city, and was not a tonnage tax within the meaning of the Constitution. This principle was re-affirmed in the case of *The Packet Co. v. St. Louis*.<sup>1</sup> We are clearly of opinion that in the exercise of its power to regulate immigration, and the very act of exercising that power, it was competent for Congress to impose this contribution on the shipowner engaged in that business." So the enormous tax of eight per cent *per annum* on the circulation of the State banks was upheld in *The Veazie Bank v. Fenno*, though manifestly unequal, and designed to drive them out of existence, because it was a means properly adopted by Congress to protect the currency which it had created; namely, the legal tender notes, and the notes of the national banks.

Notwithstanding the high authority of the tribunal which enunciated this doctrine, it may be deemed questionable, as rendering the constitutional requirement of uniformity nugatory whenever Congress think fit to disregard it. In declaring that taxation shall be uniform, the Constitution obviously means to prohibit any inequality that would contravene the rule; and a tax is not the less a tax because it is used as an indirect means of attaining some end other than that of raising money for public use. Taxation may, as we have seen, be used as a means of favoritism or oppression, to crush what the government dislikes, and promote what it regards with a favorable eye. Uniformity was prescribed in order to guard against such abuses; but the guaranty is futile if the imposition of unequal and excessive taxes, with a view to suppress obnoxious institutions or classes, and favor others, can be sustained as a regulation of commerce.

<sup>1</sup> 100 U. S. 423.

"The legislature," said Sharswood, J., in *Weber v. Reinhard*,<sup>1</sup> "could not authorize a tax to be levied on a particular property in a designated locality for a general purpose to which the whole community ought to contribute. Such a tax is in effect only a mode of taking private property for public use without compensation, and therefore unconstitutional." To justify local taxation, the property on which it is laid must therefore receive some benefit in excess of that derived by the community, which compensates the seeming inequality of the tax; and the question is one of fact that may be raised in evidence where the conclusion does not follow as a matter of law.<sup>2</sup> A statute directing the erection of a bridge, and that the cost shall be assessed on the adjacent lands in proportion to the extent to which they are severally benefited, as estimated by viewers appointed by the court, is invalid within this principle;<sup>3</sup> and so is a statute which throws the cost of repaving a street or keeping it in repair on the property holders on either side.<sup>4</sup>

However just it may be that taxation should be equal and in proportion to the benefit, the question is nevertheless primarily for the legislature, and the courts cannot declare a statute unconstitutional on this ground, unless the inequality is palpable and appears on the face of the statute, or on reading it in the light of the evidence.<sup>5</sup> What constitutes equality in legislation is, not that the law should operate on all things, but that the things on which it operates should be affected uniformly, or according to some rule which is a just

<sup>1</sup> 73 Pa. St. 370, 373.

<sup>2</sup> *Hammett v. Philadelphia*, 65 Pa. St. 146; *Craig v. Philadelphia*, 89 Pa. St. 265; *The Tidewater Co. v. Coster*, 3 C. E. Green, 518; *Agurs v. The Mayor*, 37 N. J. 415.

<sup>3</sup> *In re Saw-mill Run Bridge*, 85 Pa. St. 163; *The Tidewater Co. v. Coster*, 3 C. E. Green, 518.

<sup>4</sup> *Hammett v. Philadelphia*, 65 Pa. St. 156.

<sup>5</sup> *Sharpless v. Philadelphia*, 21 Pa. St. 147; *Kirby v. Shaw*, 19 Id. 258; *Philadelphia v. Hammett*, 65 Id. 146, 155; *Kelly v. The City of Pittsburg*, 85 Id. 170, 178; *Sigler v. Fuller*, 34 N. J. Law, 227; *Agurs v. The Mayor*, 35 Id. 172; *The Kentucky R. R. Tax Cases*, 115 U. S. 321.

deduction from the circumstances;<sup>1</sup> and the grouping of objects of a like kind for taxation is therefore not only admissible, but requisite to avoid the inequality that would result if objects of different kinds were uniformly assessed. Taxation should obviously be in proportion to the adequacy of the things and persons on which it is laid, as depending on their value, wealth, occupations, or possessions; and classification is therefore constantly, and indeed necessarily, resorted to, where money is needed for public use.<sup>2</sup> Brokers, auctioneers, cabs and hackney-coaches, street-railways, omnibuses, theatres, — in fine, all things and persons whose use or calling is public, may consequently be required to procure and pay for a license, as a means of revenue and to insure order, by bringing them under the eye of the law.

A tax cannot be laid on a county for the benefit of the entire State, nor on a borough for the benefit of the county in which it is situated, nor on an individual for the benefit of a borough;<sup>3</sup> but classes may be specifically assessed, as such, for ends in which other classes are equally interested,<sup>4</sup> and in *Durach's Appeal*, the Supreme Court of Pennsylvania held, not without poetic justice, that the saloon and tavern keepers of a borough might be assessed as a class for the support and maintenance of the police. So there is no legal or necessary inequality in classifying cities according to their population for the purpose of taxation, and the law is so held in Pennsylvania; although article thirty, section seven, of the State Constitution provides that the "General Assembly shall not pass any local or special law regulating the affairs of cities, counties, or school districts, or any local or special

<sup>1</sup> *McAunich v. Miss. & Mo. R. R. Co.*, 20 Iowa, 338; *Chic. Burl. & Quin. R. R. Co. v. Iowa*, 94 U. S. 155; *The Kentucky R. R. Tax Cases*, 115 Id. 321.

<sup>2</sup> *Durach's Appeal*, 62 Pa. St. 491; *Roup's Case*, 32 Id. 211.

<sup>3</sup> *Lexington v. McQuillan*, 9 Dana, 513; *Durach's Appeal*, 62 Pa. St. 491, 494; *Hammitt v. Philadelphia*, 65 Id. 152.

<sup>4</sup> *Durach's Appeal*, 62 Pa. St. 491; *Weber v. Reinhard*, 73 Id. 370; *Kittanning Coal Co. v. The Commonwealth*, 79 Id. 100; *State R. R. Tax Cases*, 92 U. S. 575; *St. Louis v. Green*, 70 Mo. 562.

law creating corporations or amending or renewing the charters thereof.”<sup>1</sup>

The seeming inequality of singling out a particular class for taxation should be rectified by imposing a like burden on other classes in proportion to their means; but the rule is not inflexible, and the question whether the principle has been observed, and whether there are sufficient reasons for disregarding it, is ordinarily political, and cannot be answered by the courts. A tax may consequently be so laid as to place one set of men or institutions at a marked disadvantage as compared to others that are not so burdened, and yet afford no ground for an appeal to the judiciary; and the State banks were recently forced out of existence by a tax of eight per cent on their circulation, imposed for that end, and from which the national banks were exempt.<sup>2</sup> The power to tax was read in the light of the duty to regulate the currency, with a result that could not have been attained had either stood alone.

So taxation may be used in aid of the police power to regulate and, if possible, limit the manufacture and sale of articles which, like spirituous liquors, are regarded as prejudicial to health or morals; and the statutes which in Pennsylvania and some of the other States classify insurance companies as domestic and foreign, and impose heavier burdens on the latter, should seemingly be referred to this head. Such a course is not contrary to the Bill of Rights, or provision of the Constitution of the United States that the citizens of each State shall have the immunities and privileges of the citizens of the several States, which, though precluding inequality as regards individuals, does not apply to artificial bodies springing from a foreign or extraneous source, which the various States may regulate at pleasure, or if need be, exclude.

Classification should nevertheless proceed on some reasonable and intelligible principle, or at least not be arbitrary or on a basis that must result in inequality; although no fixed

<sup>1</sup> *Kilgore v. Magee*, 85 Pa. St. 401; *Wheeler v. Philadelphia*, 77 Id. 338.

<sup>2</sup> *Loan Association v. Topeka*, 20 Wallace, 655.

rule can be prescribed for a problem that depends on so many and various considerations.

Land may be ranked as rural or urban, where the tax is municipal, in order to avoid the wrong of compelling agriculturists to pay for the construction of the sewers, lamps, and pavements that are requisite for a densely built and peopled town; but such a distinction is seemingly inadmissible where money is needed for the support of the government or other purposes that concern the States.

In like manner the inhabitants of a town may justly be classified for taxation in view of their trade or business; but it is obviously unjust to classify persons of the same trade according to the ward or quarter in which they reside or follow their occupations.

Two questions may arise in this connection. Can the whole be taxed for a purpose which only concerns a part? Can the entire burden, or more than an equal share, be imposed on a part for a purpose which concerns the whole? The first inquiry may readily be answered where the tax is general and the whole interested, though not to the same extent as the part. The revenue is under the control of the legislature, and may be applied as they think proper; and it is immaterial whether the appropriation is made after the money comes into the treasury, or by the law which imposes the tax.<sup>1</sup> The entire State may consequently be taxed for the construction of a railway in a section of its territory, although that is directly benefited and the advantage to the other sections is contingent or remote. That which benefits a part will presumably in the long run strengthen the entire system; and equality may moreover be attained by providing for the wants of each locality in its turn.

It has been decided, in accordance with this principle, that all the land within the boundaries of a municipal corporation may be taxed for the opening, grading, and paving of streets and the construction of sewers and culverts, although much of it is rural and the money will be spent in the closely built

<sup>1</sup> *Grmania Life Insurance Co. v. The Commonwealth*, 85 Pa. St. 513; *Paul v. Virginia*, 8 Wallace, 168

or urban districts, because the owners of the farm-land are presumably interested in whatever promotes the welfare of the community to which they belong.<sup>1</sup>

The question was taken to the Supreme Court of the United States which sustained the tax. It might well be that the complainant was not as much benefited as the persons living in the heart of the city, and that the advantage to him bore no just proportion to the amount of the tax; but if so, it was not a reason for setting it aside. It was impracticable to ascertain how much each member of an organized community should contribute to its support, or insure entire fairness in the distribution of the burdens which life under such circumstances involves.

Such a conclusion is nevertheless questionable. To justify local taxation, the locality must not only be benefited, but there must be an excess of benefit, which compensates the burden; and it is no less clear that a municipal corporation is an agency for the administration of a town or district, and that the State should not effect anything through its means which it could not do directly. Hence as the legislature cannot tax a rural district for the construction of the highways in a neighboring city, it ought not to extend the city bounds for the sake of bringing the adjacent lands within the reach of municipal taxation.<sup>2</sup>

It has accordingly been held in some of the States, and seemingly with justice, that the legislature cannot, by arbitrarily enlarging the boundaries of a corporation, convert country into town, and put things which are essentially unlike on the same footing. Farms may no doubt be brought under municipal control; but they are not on that account fit subjects for the charges which may properly be imposed on urban districts, and if such a tax is levied, the judiciary may intervene for the protection of the citizen.<sup>3</sup>

<sup>1</sup> *Groff v. Mayor of Frederick City*, 44 Md. 67; *Kelly v. Pittsburg*, 85 Pa. St. 170; s. c. 104 U. S. 78.

<sup>2</sup> *Bradshaw v. The City of Omaha*, 1 Neb. 16; *Kelly v. Pittsburg*, 85 Pa. St. 170.

<sup>3</sup> *Covington v. Southgate*, 15 B. Monroe, 492; *Cheaney v. Hooser*, 9

The second inquiry, Can a part be taxed exclusively or in more than an equal ratio for a purpose which concerns the whole? admits of an affirmative reply if the part is directly interested and the benefit will equal or exceed the burden. For if the use to which the money is put is of greater value to the tax-payer than the amount he is compelled to pay, he is in effect a gainer, and there is no inequality.

It is accordingly established that where an outlay, though made for the general good, gives a value to property in its vicinity which is greater than that derived by property of a like kind elsewhere, and capable of being exactly computed or according to some fixed rule, the excess may be charged on the property so benefited, or the persons to whom it belongs. The tendency is not to produce, but to obviate, inequality by apportioning the burden according to the benefit, and exonerating the many from paying for the advantage derived by a few.<sup>1</sup>

A new street through an unbuilt tract in the neighborhood of a city falls within this principle, by bringing the land into the market and fitting it for building purposes. It accordingly was, and perhaps still is, the custom in England to charge the cost of opening and constructing streets on the ground through which they pass; and the Colonists brought the practice with them to America, where it still subsists. It seems to have originated in the rapid increase of London, which caused a demand for new streets that could not be met in any other way, and was naturally adopted in the growing towns on this side of the Atlantic.<sup>2</sup>

It has therefore been held in Pennsylvania and some of the other States that where taking part of a lot of ground for a street or other public use adds a value to the residue which more than equals the loss, compensation may be withheld for

Id. 345; *Morford v. Unger*, 8 Iowa, 92; *Langworthy v. Dubuque*, 13 Id. 86; *Wells v. Weston*, 22 Mo. 386; *Gordon v. Cornes*, 47 N. Y. 614.

<sup>1</sup> *M' Masters v. The Commonwealth*, 3 Watts, 292, 296; *Sigler v. Fuller*, 34 N. J. 227.

<sup>2</sup> *Hammett v. Philadelphia*, 65 Pa. St. 146, 158.

what is so appropriated, and the excess charged on what remains.<sup>1</sup> In cases of this description the right of eminent domain and the right of taxation concur in a result that could not be produced by either if standing alone; and while the land is taken under the former power, the cost is assessed on the adjacent land by virtue of the latter, and may, where both parcels belong to the same person, be set off against the compensation in order to balance the account between the State and the individual, and the excess, if any, charged as a tax.

"It is," said Chancellor Walworth in *Livingston v. The Mayor of New York*, "a well-settled principle that where any particular county, district, or neighborhood is exclusively benefited by a public improvement, the inhabitants of that district may be taxed for the whole expenses of the improvement, and in proportion to the supposed benefit received by each. In this case, if the whole value of the property taken for a street in the city of New York is allowed to the individual owner, the proprietors of the adjacent lots must be assessed for the purpose of paying that amount; and if the individual whose property is taken is the owner of a lot adjacent, that lot must be assessed ratably with the others. It therefore makes no difference whether he is allowed the whole value of the property taken in the first instance and is assessed for his portion of the damage, or whether the one sum is offset against the other in the first place, and the balance only is allowed."

The working of the rule is intricate, and may be illustrated by an example. Let us suppose three lots, each worth \$3000, and that all are doubled in value by the opening of a street, which takes one third of the first lot, one half of the second, and two thirds of the remaining lot; the owner of the last-mentioned lot is presumably worse off by \$2000 and a gainer to the extent of \$1000, and a creditor of the State for the balance, the owner of the first, loses \$1000, but gains twice that amount, and consequently owes \$1000,

<sup>1</sup> *Pennock v. Hoover*, 5 Rawle, 291; *The City of Philadelphia v. Wistar*, 35 Pa. St. 427.

while the loss and gain are equally balanced as it regards the second lot.

Though such is *prima facie* the effect, it may be varied by circumstances, and depends on the actual loss and gain as disclosed by the evidence. I may add that the benefit may be set off against the burden under the rules which govern the assessment of damages,<sup>1</sup> although equality cannot be attained, or the land charged with the excess of benefit, without the aid of the power of taxation.

It is not essential to the application of the principle that the ground should be intersected by or border on the street, and adjacent land may be charged in proportion to the increase of value arising from the greater facility of access and consequent growth of population.<sup>2</sup>

It would obviously be of little consequence to lay out a street without fitting it for public use; and the cost of grading, paving, and curbing, and of the requisite culverts and sewers, may consequently be added to that of the ground, in ascertaining the amount of the burden and determining how much each property owner ought to bear.<sup>3</sup> There is nevertheless this difference, at all events in Pennsylvania, that while the original and superadded value of the land are determined by a jury as questions of fact, the cost of curbing, paving, etc., may be assessed on the bordering lots according to frontage, as that which in most instances gives value to the whole. The rule is inflexible; and one who has been charged under it for the construction of a culvert will not be allowed to prove that he derived no corresponding benefit, or that, from want of depth or other causes, the value of his

<sup>1</sup> Hyde Park v. Dunham, 85 Ill. 569; Page v. The Chic. Mil. & St. Paul R. R., 70 Id. 324.

<sup>2</sup> M'Masters v. The Commonwealth, 3 Watts, 292; Commonwealth v. Woods, 44 Pa. St. 113; The People v. The Mayor of Brooklyn, 4 Comstock, 419; Striker v. Kelly, 7 Hill, 9; Sigler v. Fuller, 34 N. J. 227.

<sup>3</sup> Magee v. The Commonwealth, 46 Pa. St. 358; Commonwealth v. Woods, 44 Id. 113; Huidekoper v. Meadville, 83 Id. 156; Sigler v. Fuller, 34 N. J. Law, 227; Agurs v. The Mayor, 35 Id. 172.

lot is not in proportion to its front.<sup>1</sup> Under these circumstances the question is not as to the existence of the power, but whether it has been wisely exercised; and the decision of the legislature is conclusive on the courts.<sup>2</sup>

The rule above described may be suited to a growing city, but is obviously inapplicable in the country. The cost of grading and paving a high-road through a rural neighborhood cannot therefore be assessed on the adjacent land according to the frontage or other arbitrary standard, nor without due inquiry as to the actual benefit, and an opportunity for the persons interested to appear and be heard;<sup>3</sup> and an assessment which is wanting in these requisites cannot be upheld by proof that the advantage compensates the charge, because an unconstitutional proceeding is invalid although it accidentally attains a just result.

In like manner, where a street is extended to a neighboring town through the intervening farm-land, the properties on either side of the line cannot be charged at a uniform rate without regard to the actual cost or benefit, or the farms be compelled to pay for an improvement which is not suited to their purposes, however beneficial it may be to the town; and it will make no difference that they are within the limits of a city or incorporated district as defined by law, because the legislature cannot abrogate a distinction which is founded in the nature of things, or sanction the imposition of an unequal burden. Blending town and country, city lots and farm lands, for the purpose of taxation, was pronounced by Agnew, C.-J., to be so palpably and ruinously unjust as to be an invasion of the rights of property protected by the Constitution.<sup>4</sup>

The underlying question, to which class the land belongs, is one of fact for the jury, and depends not so much on the use to which the land is put, as on its situation, and whether it is

<sup>1</sup> *Commonwealth v. Woods*, 44 Pa. St. 113; *Sigler v. Fuller*, 34 N. J. Law, 227; *Agurs v. The Mayor*, 35 Id. 172.

<sup>2</sup> *Kelly v. Pittsburg*, 85 Pa. St. 170.

<sup>3</sup> *Washington Avenue*, 69 Pa. St. 362; *The City v. Rule*, 93 Id. 15.

<sup>4</sup> *Seely v. The City of Pittsburg*, 82 Pa. St. 366.

so far surrounded by buildings that it can justly be regarded as urban.<sup>1</sup>

The burden of proof is on those who assert that a work undertaken for the common good can properly be thrown on individuals;<sup>2</sup> and such an assessment is clearly unconstitutional unless it is shown or appears that there is some local or specific benefit which takes the case out of the general rule.<sup>3</sup> To render an outlay for the general good a specific charge on property in a particular locality, it must consequently appear in evidence or by a necessary intendment that there is a gain which compensates the burden.<sup>4</sup>

The presumption of benefit may, as we have seen, be conclusive when the question grows out of the opening, grading, and paving of a street in a town; but an attempt to charge a rural neighborhood on like grounds may be resisted by showing that the work is for the benefit of the general public and without any local advantage to the owners of the adjacent land that can render it just to compel them to bear the cost.<sup>5</sup>

When the street has once been opened and put in a condition for public use, the power is exhausted, or, to speak more accurately, there is no such local or peculiar advantage from subsequent alterations or repairs as will justify the imposition of the cost on the adjacent land; and it must consequently be defrayed by the community as a whole.<sup>6</sup>

In *Hammett v. Philadelphia*, a wooden pavement which had been laid on one of the principal avenues of Philadelphia wore out. The street was repaved with Belgian blocks, and liens were filed against the premises on either side for the

<sup>1</sup> *Craig v. The City of Philadelphia*, 89 Pa. St. 265.

<sup>2</sup> *Beckert v. City of Allegheny*, 85 Pa. St. 193.

<sup>3</sup> *Craig v. The City of Philadelphia*, 89 Pa. St. 270.

<sup>4</sup> *Root's Case*, 9 Philad. 553; 77 Penn. 276; *The Tidewater Co. v. Coster*, 3 C. E. Green, 518; *In re Saw-mill Bridge*, 85 Pa. St. 163; *Louisville v. The Mill Co.*, 3 Bush, 416.

<sup>5</sup> *Craig v. The City of Philadelphia*, 89 Pa. St. 265, 270; *In re Saw-mill Bridge*, 85 Pa. St. 163.

<sup>6</sup> *Hammett v. The City of Philadelphia*, 65 Pa. St. 146; *Wistar v. Philadelphia*, 80 Id. 505.

cost, which were set aside on the ground that the owners or those under whom they claimed having already paid for the opening and construction of the street, the city must keep it in repair, and that the outlay conferred no benefit that could justly be regarded as peculiar to them or which their fellow-citizens did not share. "The original paving of a street," said Sharswood, J., in giving judgment, "brings the property bounding upon it into the market as building-lots. Before that it is a road, not a street. It is therefore clearly a local improvement, with benefits almost exclusively peculiar to the adjoining properties. But when a street is once opened and paved, and thus assimilated with the rest of the city and made part of it, all the particular benefits to the locality have been received and enjoyed. Repairing streets is as much a part of the ordinary duties of a municipality for the general good as cleaning, watching, and lighting. It would lead to monstrous injustice and inequality should such general expenses be provided for by local assessments." For like reasons, while the owner of an abutting lot may be required to grade his sidewalk in conformity to the grade of the street as originally established, he is under no obligation to raise it subsequently for the purpose of bringing it to a level with the roadway.<sup>1</sup>

It has been decided, in accordance with this principle, that the cost of erecting a bridge cannot ordinarily be thrown on the owners of the adjacent land, although the bridge is a continuation of the street in which they live, and essential to its completeness as a thoroughfare. The court held that it was impossible, from the very nature of the case, that anything approaching to accuracy could be attained in such an assessment, and the jurors obviously ought not to proceed conjecturally, or assess persons who were benefited in different degrees at the same rate.<sup>2</sup>

It seems, moreover, that the owners of marsh or meadow land cannot be legislatively compelled to build dikes or embankments at their own expense, nor can the work be

<sup>1</sup> *The City of Louisville v. The Mill Co.*, 3 Bush, 416.

<sup>2</sup> *In re Saw-mill Bridge*, 85 Pa. St. 163.

executed by the State and the entire cost imposed on them.<sup>1</sup> If such a work concerns the public, it should be done at the public cost, and the owners assessed for the increased value given to their land.

The right to impose such a duty and enforce it through the courts has nevertheless been vindicated in Massachusetts on the ground that where parties are jointly interested, and will be losers if they do not act together for their common good, there is a natural obligation, and the law may carry it into effect.<sup>2</sup>

There are, nevertheless, instances which cannot easily be reconciled with the above principles or an accurate conception of what constitutes equality in taxation. When we are told that the cost of a work which concerns the community may be thrown wholly or for the greater part on a particular town or county, on a vague presumption that it will be advantageous to the inhabitants or property owners, without inquiry whether there is such an excess of local benefit as to justify the unequal distribution of the burden, we cannot but feel that the exception is enlarged beyond just bounds, and to an extent that subverts the rule.

In *Sharpless v. The Mayor*,<sup>3</sup> an Act of Assembly authorizing the Councils of Philadelphia to subscribe to the stock of a railway which, though running through a distant section of the State, connected with another railway that led to the city, was held valid because Philadelphia was interested in whatever promoted the welfare of Pennsylvania and would bring trade to her doors; and the court could not judge of the extent of that interest, or decide that it did not equal the burden imposed by the tax. A tax agreeably to the view taken by Chief-Justice Black must be deemed valid unless it is for a purpose in which the community so charged has palpably no interest, or it is apparent that the duty is imposed for the benefit of others, and would be so pronounced at the first blush.

<sup>1</sup> *Philadelphia v. Scott*, 81 Pa. St. 80.

<sup>2</sup> *Davidson v. New Orleans*, 96 U. S. 97; *ante*, 289.

<sup>3</sup> 21 Pa. St. 147.

The Chief-Justice seems to have thought that if there was any benefit it was decisive of the question, and the court could not judge of the amount, contrary to the rule that to warrant local taxation there must be some advantage which is peculiar to the locality and in excess of that derived by the community at large. It is immaterial that the tax was not imposed directly, but through the municipality, because a municipal corporation is simply an agency for the convenient administration of the government, and can do nothing which the legislature may not do directly.

In *Kirby v. Shaw*<sup>1</sup> the court went still farther, and sustained a law imposing the entire cost of rebuilding a county court-house which had been destroyed by fire, on the borough in which it stood, on the assumption that the inhabitants would be benefited by the expenditure of the money, and by the influx of witnesses and suitors.

So a city may, agreeably to a decision of the Supreme Court of the United States, be compelled to defray the cost of improving the navigation of the bay on which it is situated, although the State will also gain by the completion of the work.<sup>2</sup>

The decisions in New York are not less at variance with the doctrine that the benefit should be co-extensive with the burden, and that local taxation which contravenes this rule is invalid. The question arose in *Thomas v. Leland*<sup>3</sup> under a law appointing commissioners and authorizing them to "assess the sum of \$41,000 upon the owners of all the real estate situated in the city of Utica, in proportion to the benefits which each shall be deemed to have acquired by the location of the northern termination of the Chenango Canal in the city of Utica, as nearly as the same can be estimated." Here, as in the case of *The Saw-mill Bridge*, already cited, the commissioners were instructed to ascertain that which from its nature was insusceptible of computation. The statute was nevertheless held to be constitutional, and

<sup>1</sup> 19 Pa. St. 258.

<sup>2</sup> *The County of Mobile v. Kimball*, 102 U. S. 691.

<sup>3</sup> 24 Wend. 65.

the assessment sustained as a legitimate exercise of the power of taxation. The decision was cited and relied on in *The People v. The Mayor of Brooklyn*,<sup>1</sup> and the case of *Gordon v. Corners*<sup>2</sup> is to the same effect.

In *Gordon v. Corners* an act was passed providing for the establishment of four normal or training-schools for the entire State, and authorizing the trustees of Buckport to levy the amount requisite for building one of them in that town by taxation, or borrowing the money on the bonds of the town. The court held that the legislature ought, as far as was practicable in exercising the power of taxation, to apportion the tax according to the benefit which the tax-payer will presumably derive from the object to which the proceeds are applied. The duty was nevertheless discretionary, and in the absence of an explicit constitutional provision its exercise could not be reviewed by the judiciary. Were one class or district arbitrarily required to pay the expenses of the State, or for a benefit conferred upon another, the provisions that property shall not be taken by virtue of the right of eminent domain without compensation, and that no person shall be deprived of his property without due process of law, would no doubt protect the citizen from impositions nominally in the form of taxes, but which were in fact forced loans or confiscation. The general expenses of the State could not therefore be levied on a single town, or the people of one locality compelled to pay for a benefit conferred upon another which bore no part of the burden. To raise such a constitutional question it must, however, be apparent that the legislature had proceeded arbitrarily, without an attempt at equalization or apportionment, and not merely that they had arrived at an erroneous conclusion. In the case in hand, the cost of maintaining the school was not thrown on Buckport, it was merely required to furnish the land and buildings; and if the quota of the district was not filled, the children of the inhabitants were to have a preference. It could not, therefore, be said judicially that there was such

<sup>1</sup> 4 Comstock, 419.

<sup>2</sup> 47 N. Y. 608.

an entire want of interest as to render the tax manifestly invalid.

The true view would seem to be the direct opposite, — that the cost of a public work can be imposed on particular classes or localities so far only as the benefit which they receive exceeds that derived by the rest of the community, which should be ascertained by some appropriate means, and cannot be arbitrarily determined by the legislature, nor without an opportunity for the parties interested to be heard in their own behalf. A law directing that the contract price or amount expended for the dikes, drains, sluices, pumps, engines, etc., requisite for draining an extensive marsh shall be assessed “in a just proportion on the land so reclaimed,” is therefore unconstitutional, because the criterion is not what the work will cost, but how much the lands in question are benefited; and the tax may well be \$5 per acre, and the increase of value only \$4.<sup>1</sup> For like reasons, a law providing that the expense of paving a road-bed shall be assessed two thirds on the abutting properties, and the remaining third on the community at large, has been held unconstitutional in New Jersey, because the question whether they are benefited, and to what extent, is one of fact, which should be determined by the evidence, and not according to a fixed rule.<sup>2</sup> Sidewalks were, on the contrary, so essential to the beneficial enjoyment of the premises to which they were attached, that they might properly be considered as appendages which it was incumbent on the owner to pave and keep in order, and he might therefore be charged with the entire cost of such work when it was done by the public.

The conclusion to be drawn from the main current of decisions may therefore be said to be that, notwithstanding some apparent exceptions, local assessments are constitutional only when imposed to pay for local improvements clearly conferring local benefits on the property so assessed, and to the extent of those benefits. They cannot be imposed when the

<sup>1</sup> *The Tidewater Co. v. Coster*, 3 C. E. Green, 518; *ante*, 288.

<sup>2</sup> *Agurs v. The Mayor*, 35 N. J. Law, 172; 37 *Id.* 415. (In 37 N. J. Law, the plaintiff's name is *Agens*.)

improvement is for the general good, without an excess of local benefit to justify the charge.

Assessment — or, in other words, a proceeding intended to ascertain for how much and according to what rate or valuation each man or thing is answerable — is a preliminary step without which taxation may readily degenerate into confiscation. If a uniform tax of one hundred dollars may be laid on houses, without regard to their real value or location, which is by no means clear, a man cannot be taxed as the owner of a house without inquiry into the fact, and an opportunity to come forward and show that it does not belong to him.

Agreeably to the view taken by the Supreme Court of the United States, the assessment of property for taxation is administrative rather than judicial, and does not require that the parties interested should be present or summoned to appear; and a tax which is wanting in these particulars will not therefore be set aside as a taking of property without due process of law.<sup>1</sup> All that justice requires is that the tax-payer should have notice of the rate or amount for which he is assessed, and of the time and place at which he may appeal; and if this course is pursued, the Constitution will exact nothing more.<sup>2</sup> Such undoubtedly is the rule where the tax is *in rem* for a sum definitely prescribed, and imposes no personal obligation.<sup>3</sup> It is moreover settled that the citizen may be required to take notice of the time and place fixed by the legislature for the performance of a duty which concerns him individually; and where a tax was challenged for want of notice and a hearing, the court held that since the day for the meeting of the board was fixed by law, as its sessions were not secret, and as any one might have appeared before it to have an error corrected, the assessment was valid, and the tax-payer could not complain that he was not actually informed.<sup>4</sup> The authorities also concur that the want of a preliminary notice is immaterial if the party inter-

<sup>1</sup> *McMillen v. Anderson*, 95 U. S. 37.

<sup>2</sup> *Davidson v. New Orleans*, 96 U. S. 97.

<sup>3</sup> *Hagar v. The Reclamation District*, 111 U. S. 701, 709.

<sup>4</sup> *The State Railroad Cases*, 92 U. S. 575, 610.

ested has an opportunity to be heard at a subsequent stage of the proceedings; and when the statute expressly or impliedly provides that the tax shall be collected by a suit, and open to any objection that could have been made in the first instance, there is no ground for an objection that the proceeding is without due process of law.<sup>1</sup>

It is none the less true that where the duty of assessors is to ascertain the absolute or relative value of taxable property, or determine what proportion an individual is to bear of a common burden, their function is judicial, and he must have such notice as will give him an opportunity to be heard.<sup>2</sup>

Every exercise of the power of taxation involves two questions: Is there a corresponding benefit? What is each man's share?

When the tax is general, and the proceeds flow into the coffers of the State, the presumption is that they will be so applied as to compensate the burden, and the courts cannot ordinarily inquire whether the legislature has fulfilled its duty in this regard; but it is still requisite to make an apportionment among the persons concerned, and in so doing to ascertain what they own, and how much it is worth. If such an inquiry is not judicial, it may result in a pecuniary obligation which is as definite and conclusive as a judgment, and is consequently within the scope of the time-honored provision that property shall not be taken without due process of law, which would be of little value if it could be evaded by designating the taking as a tax. The legislature may declare that land or that chattels shall be taxed, and according to what rate, and no power short of the popular will can reverse the decree; but if they go farther, and charge individuals or classes without providing some proper means of ascertaining whether they are in fact liable, the attempt will

<sup>1</sup> *Davidson v. New Orleans*, 96 U. S. 97, 104; *Hagar v. The Reclamation District*, 111 Id. 701, 711; *Kentucky R. R. Tax Cases*, 115 Id. 321, 325.

<sup>2</sup> *The State v. Jersey City*, 24 N. J. Law, 662; *The State v. Morristown*, 33 Id. 57; *Barhyte v. Shepherd*, 35 N. Y. 238; *Williams v. Weaver*, 78 Id. 30; *Philadelphia v. Scott*, 81 Penn. 80.

contravene the principle that no man should be deprived of any valuable right without a hearing, and may be frustrated by the judiciary.<sup>1</sup>

It may accordingly be regarded as established that taxation implies such an apportionment as will distribute the burden equally among all persons in like case, and that the legislature can no more make an assessment under which property may be taken and sold than it could render a decree that might be attended with the same result. This principle antedates Magna Charta, and would be recognized by every man who is sensible to the claims of natural justice, though it had never been embodied in written constitutions or vindicated by judges.<sup>2</sup>

It is, or should be, settled, agreeably to these decisions, that the assessment of persons or property for taxation is judicial in effect, if not in form, and subject to the general rule that proceedings shall not be *ex parte*, nor without due warning to all concerned.<sup>3</sup>

Whatever the rule may be when the tax is general, and will presumably be compensated by the appropriation of the proceeds, there can be little doubt that local taxation, depending for its constitutionality on the existence of some special benefit, and to be apportioned according to the advantage so conferred, should be based on an assessment not made legislatively, but through some proceeding in accordance with the immutable principle that no man shall be injured in his person or estate without a hearing.<sup>4</sup>

Such taxation not only involves an inquiry into facts that cannot be duly ascertained without the production of witnesses, and an argumentative consideration of their testimony that would seriously embarrass and delay legislation, but

<sup>1</sup> Washington Avenue, 69 Pa. St. 352; *Stuart v. Palmer*, 74 N. Y. 183.

<sup>2</sup> *Stuart v. Palmer*, 74 N. Y. 183, 189, 191; Washington Avenue, 69 Pa. St. 352, 362.

<sup>3</sup> The Trustees of the New York Protestant Episcopal School, 31 N. Y. 574; In the matter of Ford, 6 Lansing, 92; *Ireland v. Rochester*, 51 Barb. 414; *Clark v. Norton*, 49 N. Y. 243.

<sup>4</sup> *The Tidewater Co. v. Coster*, 3 C. E. Green (18 N. J. Eq.), 518; *Scott v. Philadelphia*, 81 Pa. St. 80.

transcends the legislative province, which is to lay down rules, and not to determine what things or persons are within their scope, and is at variance with the constitutional distribution of the functions of government among its several branches, which operates as an implied restraint on each, even when their authority is absolute as a whole.<sup>1</sup> The law was so held in *Agurs v. The Mayor*,<sup>2</sup> reversing the judgment of the court below, and virtually overruling *Sigler v. Fuller*.<sup>3</sup> This is the more true because the existence of the power depends in such cases on a preliminary inquiry, — Is there a benefit which justifies the tax? And unless this is self-evident or duly ascertained, the act is void.

The question was ably considered, and placed on what would seem to be the true basis, in the case of *Stuart v. Palmer*.<sup>4</sup> “It [the legislature] may impose taxes,” said the court, “upon all property within the State; and in such cases the owners are supposed to receive a compensation for the burdens thus imposed in the protection and benefits of the government under which they live. It may impose taxes upon local divisions of the State for the purpose of local government, and all the citizens residing in the locality must bear the burdens, as they all receive the benefits of the local government. It may cause or authorize local improvements to be made, and authorize the expense thereof to be assessed upon the lands benefited thereby; but in all cases there must be apportionment of the burdens, either among all the property owners of the State, or of the local division of the State, or the property owners specially benefited by the improvements. In either case, if one is required to pay more than his share, he receives no corresponding benefit for the excess, which may properly be styled extortion or confiscation. A tax or assessment upon property arbitrarily imposed without reference to some system of just apportionment could not be upheld. Assessments for the local improvements can be justified only upon the theory that the lands upon which they

<sup>1</sup> *Rutherford's Case*, 72 Pa. St. 82, 85; *Stuart v. Palmer*, 74 N. Y. 188.

<sup>2</sup> 35 N. J. Law, 172; 37 Id. 415; see *ante*, p. 310.

<sup>3</sup> 34 N. J. Law, 227.

<sup>4</sup> 74 N. Y. 188.

are laid are specially benefited by the improvements for which they are laid, and hence ought to bear the burden rather than property generally; and if a law should authorize such assessments to be laid without reference to benefits, it would either take property for the public good without compensation, or it would take property from one person for the direct benefit of another; and in either aspect it would be unconstitutional.<sup>1</sup>

“What one pays for taxes and assessments is taken for the public good, and can be justified upon no other theory. Private property cannot be taken for private purposes, even under the legislative power of taxation.<sup>2</sup> Taxation and assessment imply apportionment. Each person must share the burdens of taxation and assessment equally with all others in like manner. It must be conceded that property cannot be taken by the right of eminent domain without some notice to the owner, or some opportunity on the part of the owner, at some stage of the proceeding, to be heard as to the compensation to be awarded him. An act of the legislature, arbitrarily taking property for the public good, and fixing the compensation to be paid, could not be upheld. There would in such case be the absence of that ‘due process of law’ which both the Federal and State Constitutions guarantee to every citizen. Can it be that when the public takes land for a public highway the owners thereof are entitled to a hearing as to the compensation which they are to receive, and yet that the lands on both sides of the highways may be assessed to pay such compensation to their entire value without any opportunity on the part of the owners to be heard? The legislature can no more arbitrarily impose an assessment for which property may be taken and sold than it can render a judgment.”

<sup>1</sup> Kirby v. Shaw, 19 Penn. 258; Schenley v. Commonwealth, 36 Id. 29; Washington Avenue, 69 Id. 360; Patterson v. Society, etc., 24 N. J. Law, 385; Tidewater Co. v. Coster, 3 C. E. Green, 519; In the matter of the Drainage of Lands, 35 N. J. 497; St. John v. East St. Louis, 50 Ill. 92; Lee v. Ruggles, 62 Id. 427; In the matter of Albany Street, 11 Wend. 149; Litchfield v. Vernon, 41 N. Y. 123.

<sup>2</sup> Weisner v. Village of Douglass, 64 N. Y. 91.

The point arose in the case of Washington Avenue,<sup>1</sup> under a law providing for the election of commissioners to construct a macadamized road ten miles in length through the open country near Pittsburg, and assess the cost on land within half a mile on either side, at the rate of six dollars per acre as regarded certain parts, and at three dollars per acre as to certain other parts. The court held that an assessment thus made was onerous and unreasonable, and subverted private rights for the advantage of the public and of individuals who bore no part of the burden. It was, in fact, nothing more than a law to coerce certain land-owners to pay for a public improvement in which their interest was no greater than, and in some instances not so great as, that of many others who were not required to contribute. In this instance the apportionment was made legislatively; but the result will be the same where it is intrusted to commissioners, without providing for the hearing to which the citizen is of right entitled.

In *Stuart v. Palmer* it had been enacted that three persons appointed by the Supreme Court should open and pave an avenue through the town of New Lots in King's County, New York, "take such land as was requisite, estimate the value thereof, award damages to the owners, and assess the amount on the lands benefited by the opening of the avenue in proportion to the benefits."<sup>2</sup> No notice of any kind was given to the complainant or the other property owners; but the Supreme Court held that notice was not requisite, and confirmed the assessment. The case was then taken on an appeal to the court of last resort, which pronounced the proceeding invalid, as springing from a defective root. It was not enough that the parties might, or in fact did, have the hearing as a favor, which was theirs by right, nor was it material that the assessment was just, and worked no wrong. The constitutionality of a statute depended, not on what was done under it, but on what it provided for or allowed. The

<sup>1</sup> 69 Pa. St. 352.

<sup>2</sup> *Rutherford's Case*, 72 Pa. St. 82; *Philadelphia v. Scott*, 81 Id. 84; *Stuart v. Palmer*, 74 N. Y. 183.

legislature might prescribe the kind of notice and the mode of giving it; but notice in some form was essential to the validity of any proceeding that affected the rights or property of the citizen.

It results from the same principle that in assessing such a tax, regard must be had to benefit as distinguished from cost; and an act charging the land-owners of a locality with the contract price of a public work will be unconstitutional, although it is to be apportioned or distributed in the ratio of the increase of value or other advantages respectively conferred.<sup>1</sup>

It has, notwithstanding, been held that when the local advantage is manifest and indisputable, there is no need of inquiry, and the legislature may direct that the cost of a work which concerns the entire locality shall be levied generally upon the inhabitants, or even charge the sewers, culverts, and paving which are necessary for the completion of a street, on the lands on either side according to frontage, as being as near an approximation to their share of the excess of benefit as could be attained, by summoning a jury and hearing the testimony of experts.<sup>2</sup> Such cases are exceptional, and the rule, as has been already stated, is the reverse.<sup>3</sup>

To render a tax on property valid, the thing or the person to whom it belongs must be amenable to the authority of the government which lays the tax.<sup>4</sup> Jurisdiction is as essential to taxation as to the validity of a judgment; and the assessment of an individual at a given rate as the owner of a watch, carriage, or horse, is in effect a judgment which may be enforced by a levy and sale of his effects. Where it does not exist, the imposition of a tax is *ultra vires* and invalid. The legislature

<sup>1</sup> The Tidewater Co. v. Coster, 3 C. E. Green, 518.

<sup>2</sup> Sigler v. Fuller, 34 N. J. Law, 227; Commonwealth v. Woods, 44 Pa. St. 113.

<sup>3</sup> *In re* Washington Avenue, 69 Pa. St. 352, 361; Craig v. Philadelphia, 89 Pa. St. 269; Seeley v. Pittsburg, 82 Pa. St. 360; Agurs v. The Mayor, 35 N. J. Law, 172.

<sup>4</sup> Chicago R. R. Co. v. The Commonwealth, 16 P. F. Smith, 73; Commonwealth v. Standard Oil Co., 101 Pa. 119, 145; The Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196.

can no more lay a burden on persons or property in another State or country than it can regulate or control them in any other particular; and such a law is as nugatory as if it were expressly inhibited by the Constitution.<sup>1</sup> Hence a company chartered by another State, and constructively domiciled there, can be taxed for so much only of its property or business as exists or is transacted in the State which lays the tax.<sup>2</sup>

If the property is in the State it may be taxed, although the owner resides elsewhere;<sup>3</sup> or the owner may be taxed irrespective of the situation of the property, even if he is a trustee, agent, or executor, and the persons beneficially interested are beyond the jurisdiction.<sup>4</sup> Were a State to enact that residents should be taxed in proportion to the value of their property, wherever situated, and though consisting of lands in another jurisdiction, the law might be impolitic and unjust, but seemingly would not be against any constitutional prohibition, or invalid. Such taxes are not so much personal, as a charge on property through the exercise of jurisdiction over the person. But a State may impose a poll or strictly personal tax without reference to property or tax on the franchise of an incorporated company, which is personal, and may be valid whether their capital is or is not liable to taxation.<sup>5</sup>

Though personal property may be taxed in the place where it is situated, it is in contemplation of law attached to

<sup>1</sup> *The Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 208; *St. Louis v. The Ferry Co.*, 11 Wallace, 423; *The Railroad Co. v. Pennsylvania*, 15 Id. 300.

<sup>2</sup> *St. Louis v. The Ferry Co.*, 11 Wallace, 423; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Hayes v. The Pacific Steamship Co.*, 17 Howard, 596; *The Commonwealth v. The Standard Oil Co.*, 101 Pa. 119.

<sup>3</sup> *Hoyt v. The Commissioners*, 23 N. Y. 224; *Finley v. Philadelphia*, 32 Penn. 381; *Catlen v. Hall*, 21 Vt. 152.

<sup>4</sup> *Hoyt v. The Commissioners*, 23 N. Y. 224, 227, 232; *Catlin v. Hall*, 21 Vt. 152.

<sup>5</sup> *Society for Savings v. Coite*, 6 Wallace, 594; *Provident Insurance Co. v. Massachusetts*, Ib. 611.

the person of the owner, and open to taxation by the State in which he resides ; and shares of stock must be taxed there, because they have no tangible existence and can only be reached through the person to whom they belong.<sup>1</sup> So the residence of the debtor will not justify the imposition of a tax on a creditor who is a citizen of another State or foreign country, because *debitum et contractus sunt nullius loci*, and the *situs* of a *chose in action* depends on the domicile of the person to whom the amount is due.<sup>2</sup> If such taxation may take place in other countries, it is impracticable in the United States, because the creditor is beyond the reach of process ; and requiring the debtor to pay the whole or any part of what he owes into the State treasury would impair the obligation of the contract.

A statute providing that all, or a specific class of, debtors shall pay the State a certain proportion of the sum due, and charge the same as a credit, is void as to creditors beyond the jurisdiction of the State which enacts the law, because it can have no extra-territorial operation as a tax, and contravenes the creditor's right to be paid in full if regarded as a regulation of the contract. A law taxing the bonds of railway or other companies held by non-residents, and requiring the company to pay the tax and deduct it from the accruing interest, is consequently inoperative both as it regards the creditor and the debtor, although secured by a mortgage of land within the State ; and if the company pays the tax it must bear the loss, and cannot deduct the amount from the interest due on the bonds.<sup>3</sup>

"Corporations," said Field J., "may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense ; they are obligations of the debtor, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors

<sup>1</sup> The Commonwealth v. The Standard Oil Co., 101 Pa. 119, 149.

<sup>2</sup> State Tax on Foreign-held Bonds, 15 Wallace, 300, 326.

<sup>3</sup> State Tax on Foreign-held Bonds, 15 Wallace, 317.

is simply to misuse terms. All the property there can be in the nature of things in debts of corporations belongs to the creditors to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications; but no number of authorities and no forms of expression could add anything to its obvious truth, which is recognized upon its simple statement. The bonds issued by the railroad company in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by non-residents of the State, they are property beyond the jurisdiction of the State. The law which requires the treasurer of the company to retain five per cent of the interest due to the non-resident bondholder is not, therefore, a legitimate exercise of the taxing-power. It is a law which interferes between the company and the bondholder, and under the pretence of levying a tax commands the company to withhold a portion of the stipulated interest and pay it over to the State. It is a law which thus impairs the obligation of the contract between the parties. The obligation of a contract depends upon its terms and the means which the law in existence at the time affords for its enforcement. A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation; for, as stated on another occasion, such a law relieves the parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal enforcement. The act of Pennsylvania of May 1, 1868, falls within this description. It directs the treasurer of every incorporated company to retain from the interest stipulated to its bondholders five per cent upon every dollar and pay it into the treasury of the Commonwealth. It thus sanctions and commands a disregard of the express provisions of the contracts between the company and its creditors. It is only one of many cases where, under the name of taxation, an oppressive exaction is made without

constitutional warrant, amounting to little less than an arbitrary seizure of private property. It is, in fact, a forced contribution levied upon property held in other States, where it is subjected, or may be subjected, to taxation upon an estimate of its full value.

“It is undoubtedly true that the actual *situs* of personal property which has a visible and tangible existence, and not the domicile of its owner, will in many cases determine the State in which it may be taxed. The same thing is true of public securities consisting of State bonds and bonds of municipal bodies, and circulating notes of banking institutions: the former, by general usage, have acquired the character of, and are treated as, property in the place where they are found, though removed from the domicile of the owner; the latter are treated and pass as money wherever they are. But other personal property, consisting of bonds, mortgages, and debts generally, has no *situs* independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of debt, are not separated from the possession of the owners. Cases were cited by counsel on the argument from the decisions of the highest courts of several States which accord with the views we have expressed.”<sup>1</sup>

The rule that a tax cannot be laid extra-territorially also precludes a State from taxing vessels which, though trading within the State, are owned and registered elsewhere. The vessel cannot be taxed specifically, consistently with the prohibition of tonnage duties, and the owner is beyond the reach of the law.<sup>2</sup>

To render things or persons taxable, their *situs*, domicile, or residence should be in the place or country which lays the tax; and the fact that chattels or individuals are found in the State is not enough if they are *in transitu*, and came or were brought into the State for the purpose of being carried through or out of it, or seemingly in the case

<sup>1</sup> Davenport v. The Mississippi & Missouri R. R. Co., 12 Iowa, 539.

<sup>2</sup> Hays v. The Pacific Steamship Co., 17 Howard, 596.

of chattels in order to be sold for the account of a non-resident owner.<sup>1</sup>

A non-resident will not become liable to taxation by staying at an hotel or boarding-house for weeks or months, nor will a vessel by touching at a port to discharge or receive passengers or freight, or going into dock for repairs.<sup>2</sup> Aside from this general principle, which appears broad enough to cover railway trains passing and repassing through, but not owned in, a State,<sup>3</sup> it is well settled that whether a vessel, locomotive, or carriage is or is not so situated that it may be taxed in proportion to its value in common with other property of the same class, no fee, tax, or charge can be laid or demanded for the privilege of using it as a means of interstate or foreign commerce; and in the case last cited a charge of fifty dollars on each Pullman car run into or through Tennessee was held invalid on the above grounds.

The subjects of taxation are persons, property, and business, and any one of them may be taxed although the others are beyond the jurisdiction.<sup>4</sup> A tax may consequently be laid on the receipts or profits of a business, irrespective of the residence of the persons by or on whose behalf it is carried on; and the carriage of freight and express matter is none the less liable to taxation because the carriers are not subject to the authority of the government which lays the tax. When, however, the transportation is through two or more States, or from a foreign country, it comes under the control of Congress, and will be exempt from State taxation.<sup>5</sup>

In the case last cited the suit grew out of a tax laid by the legislature of Pennsylvania on a company chartered by

<sup>1</sup> See *Hoyt v. The Commissioners*, 23 N. Y. 224; *The Parker Mills v. The Commission*, Id. 242; *Commonwealth v. Standard Oil Co.*, 101 Pa. 119, 146; *Pickard v. The Pullman Car Co.*, 117 U. S. 34, 46; *ante*, 274.

<sup>2</sup> *Morgan v. Parham*, 16 Wallace, 471; *Hays v. The Pacific Mail Steamship Co.*, 17 Howard, 596; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

<sup>3</sup> *Pickard v. Pullman Car Co.*, 117 U. S. 34, 36.

<sup>4</sup> *The Railroad Co. v. Pennsylvania*, 15 Wallace, 300.

<sup>5</sup> *The Gloucester Ferry Co. v. Pennsylvania*, 98 Penn. 105; 114 U. S. 196.

New Jersey, whose sole business consisted in ferrying goods and persons across the Delaware between Gloucester in the latter State and Philadelphia in the former. The only property belonging to the company in Pennsylvania was a lease of the dock or wharf where freight and passengers were received and landed and the tolls collected; but the tax was sustained by the State court on the ground that "the whole income of the company was derived from the transportation of freight and passengers from its wharf at Gloucester to its wharf at Philadelphia, and from its wharf in Philadelphia to its wharf in Gloucester. At each of these points it had a place (that is, a wharf) where its main business (namely, its receipt of freight and passengers) was transacted; and for that business it was just as much dependent upon the one place as upon the other. Again, a wharf, or landing-place, was necessary at each end of its route. The one it occupied at Gloucester was owned in fee, and the one in Philadelphia it held under a lease; but as it could hold by purchase in New Jersey only by virtue of the power derived from the statutory will of the legislature of that State, so it could hold by lease in Philadelphia only by the implied consent of the legislature of Pennsylvania. It thus appeared that the defendant was dependent equally not only for its business, but its power to do that business, upon both States, and might, therefore, be taxed by both.

This judgment was reversed by the Supreme Court of the United States because the business of landing and receiving passengers and freight at the wharf in Philadelphia was a necessary incident to, and indeed a part of, their transportation across the Delaware River from New Jersey. Without it that transportation would be impossible. Transportation implies the taking up of persons or property at some point and putting them down at another. A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between the two States involved in such transportation.

The second reason assigned by the court below, that the company could not lease their wharf in Philadelphia except with

the implied consent of the State legislature, was fallacious, because foreign or interstate commerce cannot be carried on in vessels without the use of wharves or landing-places; and if a State could withhold the privilege, or accord it only on such terms as she thought fit, the power of Congress over navigation would be subverted or rendered unavailing. If such a tax could be imposed, the amount would depend on the discretion of the State; and persons engaged in commerce were entitled to immunity from local charges until the act of transportation was complete. The only control that could properly be exercised by the State was through the adoption of such measures as fall under the general head of port regulations and tend to prevent collisions, give security, preserve order, and facilitate the discharge and receipt of passengers and freight.<sup>1</sup>

<sup>1</sup> "It matters not that the transportation is made in ferry-boats which pass between the States every hour of the day. The means of transportation of persons and freight between the States does not change the character of the business as one of commerce, nor does the time within which the distance between the States may be traversed. Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed; that is, the conditions upon which it shall be conducted, — to determine when it shall be free, and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of them, which are local and limited in their nature or sphere of operation, the States may prescribe regulations until Congress intervenes and assumes control of them, yet when they are national in their character, and require uniformity of regulation affecting alike all the States, the power of Congress is exclusive. Necessarily that power alone can prescribe regulations which are to govern the whole country; and it needs no argument to show that the commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject of national character and requires uniformity of regulation. Congress

It is a logical inference from this decision that a company which is not domiciled in or chartered by the State will no more become liable to taxation by opening an office for the sale and delivery of the products of other States or countries, than if the business transacted in it were the landing and receipt of freight and the collection of tolls, because buying and selling are as much a part of commerce as transportation.<sup>1</sup>

It is also clear that an individual or company will not subject themselves to the jurisdiction of a State as regards taxation,—by owning or renting a wharf or dock where their vessels stop to land their cargoes or for repairs. The dock may be taxed like other property within the State and under her control; but the vessels are means of commerce, and the company are subject to the government of the place where they are actually or constructively domiciled or carry

alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by State legislation. Otherwise there would be no protection against conflicting regulations of different States, each legislating in favor of its own citizens and products and against those of other States. It was from apprehension of such conflicting and discriminating State legislation, and to secure uniformity of regulation, that the power to regulate commerce with foreign nations and among the States was vested in Congress. Nor does it make any difference whether such commerce is carried on by individuals or by corporations. *Welton v. Missouri*, 91 U. S. 275; *Mobile v. Kimball*, 102 U. S. 691. As was said in *Paul v. Virginia*, 8 Wallace, 168, at the time of the formation of the Constitution a large part of the commerce of the world was carried on by corporations; and the East India Company, the Hudson Bay Company, the Hamburg Company, the Levant Company, and the Virginia Company were mentioned as among the corporations which, from the extent of their operations, had become celebrated throughout the commercial world. The grant of power is general in its terms, making no reference to the agencies by which commerce may be carried on. It includes commerce, by whomsoever conducted, whether by individuals or by corporations. At the present day nearly all enterprises of a commercial character, requiring for their successful management large expenditures of money, are conducted by corporations. The usual means of transportation on the public waters, where expedition is desired." *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

<sup>1</sup> *Cooper Manuf. Co. v. Ferguson*, 113 U. S. 727, 736; *Commonwealth v. Standard Oil Co.*, 101 Penn. 119.

on their business, and do not owe obedience to both masters.<sup>1</sup> And such also is the rule where a company chartered in one State or country establish an office or agency in another, for the transaction of foreign and interstate commerce; as, for instance, buying goods within the State for exportation, or selling goods without the State for importation.<sup>2</sup>

In *The Commonwealth v. The Standard Oil Co.*, the State of Pennsylvania was plaintiff, and a company chartered by Ohio to manufacture and deal in petroleum and its products were defendants. The trial court found that the defendant company had for many years made extensive purchases of crude petroleum in Pennsylvania through resident brokers, to whom the necessary funds were sent from time to time, without being permanently invested there. The petroleum was shipped to and refined at refineries beyond the limits of the State. It also appeared that the defendants, during the same years, owned shares of stock in Pennsylvania corporations, and were interested in incorporated companies and partnerships which were engaged in business in Pennsylvania as producers, refiners, or purchasers of oil. The main question was whether this course of dealing rendered the defendants liable to taxation in Pennsylvania, and to what extent. The court held that the above facts and circumstances did not constitute such a "doing of business in Pennsylvania" as would render the defendants liable to taxation, with this exception,—that the defendants, by entering into partnership with persons who were confessedly engaged in business within the State, came under her control for the purpose of taxation. They could not, however, be taxed for the whole amount of their capital stock, but only for so much of it as was represented by their property and assets in the State.

"It has been repeatedly decided," said Paxson, J., "and is

<sup>1</sup> *Hays v. The Steamship Co.*, 17 Howard, 596; *Morgan v. Parham*, 16 Wallace, 471; *St. Louis v. The Ferry Co.*, 11 Id. 423; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

<sup>2</sup> *Cooper Manuf. Co. v. Ferguson*, 113 U. S. 727, 736; *The Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *The Commonwealth v. The Standard Oil Co.*, 101 Penn. 119.

settled law, that a tax upon the capital stock of a company is a tax upon its property and assets.<sup>1</sup> Equally well settled is the principle that the power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State; these subjects are persons, property, and business.<sup>2</sup>

“It is undoubtedly competent for the legislature to lay a franchise or license tax upon foreign corporations for the privilege of doing business within this State. . . . A license tax is evidently intended as a compensation to the State for the protection which it affords foreign corporations who have an office within its borders for the convenience of its officers, but upon whose property it could impose no tax because not within its jurisdiction. The tax in this case is in no sense a license tax. The State never granted a license to the Standard Oil Company to do business here. It merely taxes its property, — that is, its capital stock, — to the extent that it brings such property within its borders in the transaction of its business. It was contended on behalf of the Commonwealth that when a foreign corporation enters the State to do business, it brings its entire capital stock with it. This position is ingenious but unsound. It is a fundamental principle that the person must have a domicile in the State in order to be taxed, and the thing must have a *situs* therein.<sup>3</sup> Persons and property *in transitu* cannot be taxed.<sup>4</sup> The

<sup>1</sup> *Saving Fund v. Yard*, 9 Barr, 359; *Lehigh Coal & Navigation Co. v. Northampton County*, 8 W. & S. 334; *New York & Erie R. R. Co. v. Sabin*, 2 Casey, 242; *Erie R. R. Co. v. The Commonwealth*, 66 Pa. 84; *County of Lackawanna v. The Bank*, 94 Id. 221; *Coatesville Gas Co. v. Chester County*, 97 Id. 476; *New Haven v. Bank of New Haven*, 31 Conn. 106; *Nichols v. New Haven Co.*, 42 Id. 103; *Quincy R. R. Bridge Co. v. Adams*, 88 Ill. 615; *Hannibal & St. Joseph R. R. Co. v. Schacklett*, 30 Mo. 558; *National Bank v. Com.*, 9 Wallace, 353; *Illinois R. R. Tax Cases*, 2 Otto, 598.

<sup>2</sup> See *State Tax on Foreign-held Bonds*, 15 Wallace, 319; *Maltby v. Reading & Columbia R. R. Co.*, 2 P. F. S. 146; *McCulloch v. State of Maryland*, 4 Wheaton, 316.

<sup>3</sup> *Hays v. Pacific Mail Co.*, 17 Howard, 596; *Morgan v. Parham*, 16 Wallace, 471; *St. Louis v. The Ferry Co.*, 11 Wallace, 423.

<sup>4</sup> *Hoyt v. Commissioners of Taxes*, 23 N. Y. 224.

domicile of a corporation is the State of its origin,<sup>1</sup> and it cannot migrate to another sovereignty.<sup>2</sup> The domicile of the Standard Oil Company is in the State of Ohio. Being a corporation, it is an invisible, artificial, and intangible thing. When it sent its agents to this State to transact business, it no more entered the State in point of fact than any other foreign corporation, firm, or individual who sends an agent here to open an office or branch house.

“Nor does it bring its capital here constructively. A corporation must be considered as a person, — an artificial one, it is true ; and it would be as reasonable to assume that a business firm in Ohio brought its entire capital here, because it sent an agent here to establish a branch of its business, as to hold that the Standard Oil Company, by employing certain persons in this State to transact a portion of its business, thereby brought all its property or capital stock within our jurisdiction. There is neither reason nor authority for such a proposition. Speaking for myself, I doubt the power of the legislature to tax the entire property and assets ; that is, the entire capital stock of a foreign corporation whose necessities compel it to transact a portion of its business, however small, within this State. I concede the power of the Commonwealth to exclude foreign corporations altogether from her borders ; or she may impose a license tax so heavy as practically to amount to the same thing. But great and searching as her taxing power is, I deny that it can tax either persons or property not within its jurisdiction. A foreign corporation has no domicile here, and can have none ; hence it cannot be said to draw to itself the constructive possession of its property located elsewhere. There are a large number of foreign insurance companies doing business here under license from the State. Some of them have a very large capital. It is usually invested at the domicile of the company. If the position of the Commonwealth is correct, she can tax the entire property of the Royal Insurance Company,

<sup>1</sup> Potter on Corporations, sect. 10.

<sup>2</sup> *Bank of Augusta v. Earle*, 13 Peters, 586 ; *Paul v. Virginia*, 8 Wallace, 168 ; *St. Louis v. The Ferry Co.*, 11 Wallace, 423.

although the same is located almost wholly in England, or the assets of the New York Mutual, located in New York."

It followed that the court below was clearly right in holding that the purchase by the defendants of oil in Pennsylvania for the purpose of shipping it to their refineries without the State, was not such a transaction of business as would render them liable to taxation. Nor could the defendants be taxed upon their shares of stock in Pennsylvania corporations, including limited partnerships.

"The capital stock of a corporation is a different thing from shares of stock.<sup>1</sup> The capital stock represents the property and assets of the company, which may consist in whole or in part of real estate. The certificates or shares of stock are the evidence of an interest which the holder has in the corporation, and it is well settled that this interest is personal property,<sup>2</sup> and, as such, follows the person of the owner. It was held in *McKeen v. County of Northampton*<sup>3</sup> that shares of stock are taxable at the domicile of the owner, although the shares are the stock of a corporation of another State. Commonly shares of stock in a Pennsylvania corporation, held by a corporation or individual domiciled in another State, cannot be taxed here. One sufficient reason is that there is nothing here to tax. The capital stock—that is, the property and assets—are here and are taxed. But the shares or certificates of stock are not here. They are actually and constructively at the domicile of the owner, at which place they are subject to taxation by the taxing power of the place."<sup>4</sup>

In the *Gloucester Ferry Co. v. Pennsylvania*,<sup>5</sup> this opinion was cited by the Supreme Court of the United States as giving a correct exposition of the law; and it is settled, in accordance with the views therein expressed, that the legislature may prescribe the terms on which a foreign cor-

<sup>1</sup> *Lycoming County v. Gambier*, 11 Wright, 110.

<sup>2</sup> *Bouvier's Law Dict.*; 4 *Davis*, Ab. 670.

<sup>3</sup> 13 Wright, 519.

<sup>4</sup> *The Commonwealth v. Standard Oil Co.*, 101 Pa. 119. See 114 U. S. 196, 209.

<sup>5</sup> 114 U. S.

poration shall be allowed to carry on business within the State.<sup>1</sup> But a State cannot, by virtue or under color of this right, prohibit or regulate commerce among the States or with foreign nations, or impose limitations on the power of corporations chartered by other States or countries to make contracts for carrying on interstate or foreign trade.<sup>2</sup>

The right of a shareholder in an incorporated company is not to a sum fixed by contract, but to his proportion of the capital or profits, as awarded from time to time and regulated by law; and consequently there is no valid objection to an act of Congress providing that the stock of a national bank shall be taxable only by the State where the bank is located, although the owner is not a citizen, or resides elsewhere.<sup>3</sup>

It was laid down in the *Federalist*, and has never been controverted, that the right of the United States to tax does not preclude a State from taxing a subject-matter which has been already taxed by Congress, subject to the priority of the United States if the fund is insufficient to meet both demands. Hence a license granted by the United States for the sale of liquor for the purpose of revenue, will not authorize the licensee to sell contrary to the laws of the State, or without paying the tax which it has imposed. Such legislation is restrictive that sales shall not be made without a license, and does not confer any greater right than would exist independently of the law. In other words, it is simply an exercise of the power of Congress to tax, and is not exclusive of the right of the State to impose an additional tax on the same subject-matter, and therefore differs widely from a coasting license granted in pursuance of the commercial power, which implies that the States are not to disturb what Congress have regulated.<sup>4</sup>

<sup>1</sup> *Bank of Augusta v. Earle*, 13 Peters, 519; *Ducat v. Chicago*, 10 Wallace, 416; *The Philadelphia Tr. Association v. New York*, 119 U. S. 110.

<sup>2</sup> *Paul v. Virginia* 8 Wallace, 168; *Cooper Manuf. Co. v. Ferguson*, 113 U. S. 727, 734.

<sup>3</sup> *The National Bank v. The Commonwealth*, 9 Wallace, 362; *Hepburn v. The School Directors*, 79 Pa. St. 159; 23 Wallace, 480.

<sup>4</sup> *McGuire v. The Commonwealth*, 3 Wallace, 387.

## LECTURE XVIII.

Eminent Domain.—Its Source and Nature.—Its Exercise limited to Public Purposes.—The Question whether the Purpose is public primarily for the Legislature, but ultimately for the Judiciary; the Question of Expediency for the Legislature alone.—The Right of the Owner to Compensation.—Measure of Damages.

THE right of eminent domain is that of taking property for public use, and is called “eminent” because it is vested in the State, and may supersede every private right or title. The public domain of the government is that which it holds or owns in its sovereign capacity as a trustee for the people. Its eminent domain is a power, by virtue of which it is potentially the owner of the entire mass of property within its jurisdiction, and may acquire such portions of it as are requisite for governmental purposes.<sup>1</sup> Like the power to tax, to arrest for the prevention of offences, and to punish them when committed, it is an attribute of sovereignty and essential to the ends for which government is instituted, and is therefore possessed by Congress, although not expressly conferred.<sup>2</sup> It was accordingly declared, in the case last cited, that, there being no constitutional prohibition, the United States have, like other sovereigns, a right which is the offspring of a necessity existing under every form of government, and may exercise it within the boundaries of the several

<sup>1</sup> *West River Bridge v. Dix*, 6 Howard, 507, 540; *Von Brocklin v. Tennessee*, 117 U. S. 151, 154; *The United States v. Great Falls M. Co.*, 112 U. S. 645; *The United States v. Jones*, 109 Id. 573.

<sup>2</sup> *Sinnickson v. Johnsons*, 2 Harrison, N. J. 129; *Gardner v. Newburgh*, 2 Johnson's Ch. 162; *Pumpelly v. The Green Bay Co.*, 13 Wallace, 166; *Smith v. The City of Rochester*, 92 N. Y. 463, 477; *Kohl v. The United States*, 91 U. S. 372.

States without obtaining their assent or co-operation. This does not depend on the language of the Fifth Amendment, that property shall not be taken for public use without compensation, but on an implication which would be irresistible had that not been adopted, because it is unreasonable to suppose that the Constitution as originally framed left the government powerless in so important a particular, and unable to appropriate the land needed for its fortifications, arsenals, and public buildings. The right of eminent domain is so far analogous to taxation that both depend on the right of the State to so much of the property of its subjects as may be requisite for the public needs; but there is this difference, — that while taxation distributes the burden among all, the entire charge may, under the right of eminent domain, be thrown on an individual, who may be compelled to surrender his house, his farm, or some object which use has endeared, without being entitled to a *pretium affectionis*, or to more than its fair market value. The last-mentioned power operates on land or goods to appropriate them specifically to some end that can be attained in no other way, while the former imposes a pecuniary obligation, or to render things of a certain kind, which may be satisfied by payment. The use to which the proceeds are applied is presumably an equivalent for the loss occasioned by taxation; but there is no room for such an inference as it regards the right of eminent domain, which is accordingly attended with a moral, and, under the organic law of the United States, a legal obligation to compensate the person who is deprived of his property for the general good. This distinguishes the exercise of the right of eminent domain from taxation in kind, which is in other respects much the same. Were the legislature to enact that farmers, or the proprietors of mines, should render a tenth of their wheat or coal, it would be a tax; but if a statute authorizing a general or a board of commissioners to appropriate as much wheat or coal as the exigency requires, is valid, it can be so only as an exercise of the right of eminent domain.

The line of demarcation was accurately drawn by Ruggles,

J., in *The People v. The Mayor of Brooklyn*.<sup>1</sup> "Taxation exacts money or services from individuals as and for their respective shares of contribution to any public burden. Private property taken for public use by right of eminent domain is taken, not as the owner's share of contribution to a public burden, but as so much beyond his share. Special compensation is therefore to be made in the latter case, because the government is a debtor for the property so taken; but not in the former, because the payment of taxes is a duty, and creates no obligation to repay, otherwise than in the proper application of the tax. Taxation operates upon a community, or upon a class of persons in a community, and by some rule of apportionment. The exercise of the right of eminent domain operates upon an individual, and without reference to the amount or value exacted from any other individual or class of individuals."

It results from what has been said that eminent domain may be described as a right to provide for the common defence and general welfare by purchasing such property as is specifically requisite for these ends, without the consent of the owner, and at a price set, not by contract, but according to certain general rules.<sup>2</sup> The right does not ordinarily, therefore, extend to fungible goods; as, for instance, food, clothing, money, or other products, which may in general be obtained at current rates, and where one parcel may presumably take the place of another.<sup>3</sup> It would obviously be unjust and oppressive to compel A to part with what can be obtained in the ordinary course of business from B.

The State should not take compulsorily where it is possible to buy, or infringe private rights unless there is no other way. Taxation is therefore the preferable mode whenever

<sup>1</sup> 4 Comstock, 419, 424.

<sup>2</sup> "The public," says Blackstone, "is now considered as an individual treating with an individual for an exchange; and all that the legislature does is to oblige the owner to alienate his possession for a reasonable price." Such is the view also taken by Chancellor Kent in *Gardner v. Newburgh*, 2 Johnson's Ch. 162, 167, and it is sanctioned by the judgment in *Pumpelly v. The Green Bay Co.*, 13 Wallace, 166.

<sup>3</sup> *People v. Brooklyn*, 4 Comstock, 419.

it can be successfully employed, and recourse should not be had to the right of eminent domain unless purchasing is impracticable, or would involve a disproportionate cost. Still, there may conceivably be cases where stores, clothing, or money are imperatively required to maintain an army or fit out a fleet, and the supply is limited, or held at an exorbitant rate; and the right of eminent domain may then be invoked with as much reason as if land were needed for a navy-yard or the site of a fortification.<sup>1</sup>

The right of eminent domain would seem to result from the title of the nation as an organized body politic to the country considered as a whole, as distinguished from the title of the citizen to his land or chattels. In this sense France belongs to the French, England to the English, and our own land to the people of the United States. The right of a people to their country is at least as clear as that of a man to his house or ground,—a doctrine that would have seemed indisputable in antiquity, although it may be questioned by the philanthropy of the present time. The right of property in land seems to have originated among most races in the claim of the several tribes or clans to as much territory as each could occupy or defend, and private right is a derivation from that source, and subordinate to the requirements of the community as a whole. Under the feudal system, the title to real estate was held directly or indirectly of the sovereign; and there is hardly an acre of land in the United States that may not be traced back to a grant from the king, from the proprietaries whom he enfeoffed, from the States which succeeded to their rights, or from the General Government. It is by virtue of such ownership that a State may, if the circumstances require it, exclude the citizens or subjects of another,—a right arbitrarily denied by the Europeans to China and Japan, but which may be essential to protect a nation from a peaceful invasion, which, under the guise of emigration, would subvert its religion, institutions, and laws. The power of eminent domain comes from

<sup>1</sup> *Hammett v. Philadelphia*, 65 Pa. St. 146.

the same source, and is a just consequence of the right of the State to take whatever is requisite for its own existence, in return for the safeguard which it affords the citizen, without which property would be of little worth. Without it, salutary measures and improvements that ought not to be postponed — high-roads, railways, fortifications, parks — might be brought to a standstill by the greed or self-will of an individual who refused to part with his ground on any terms, or demanded an exorbitant price; but the power is obviously susceptible of abuse, and should, therefore, be confined within reasonable bounds, and used with a due regard for the interests and feelings of the persons who are compelled to surrender their lands or goods in order to promote the general welfare. It has no limits under an absolute government, whether of King or Parliament, save the sovereign's judgment; but is subject under our system to restraints that are intended to prevent it from being used as a means of confiscation, or degenerating into the communism which would render property valueless to every one, in endeavoring to render it available for all.<sup>1</sup>

The United States possess the right of eminent domain for the purposes for which they were constituted as fully as do the States for their appropriate ends;<sup>2</sup> but the practice was for the States to take property needed by the General Government, and then turn it over to the latter,<sup>3</sup> and the recent case of *Kohl v. The Insurance Co.*<sup>4</sup> was among the first in which the United States asserted their power in this behalf, by taking land in the city of Cincinnati for the erection of a

<sup>1</sup> *Palairot's Appeal*, 67 Pa. St. 479; *Sinnickson v. Johnsons*, 2 Harrison, N. J. 145; *Pumpelly v. The Green Bay Co.*, 13 Wallace, 166; *The Bridge Co. v. The United States*, 105 U. S. 470.

<sup>2</sup> *Illinois Central R. R. Co. v. The United States*, 20 Law Reporter, 630; *Kohl v. The United States*, 91 U. S. 372; *Van Brocklin v. Tennessee*, 117 Id. 151, 154; *The United States v. Great Falls Manuf. Co.*, 112 Id. 645; *The United States v. Jones*, 109 Id. 513; *The United States v. Fox*, 94 Id. 315, 320.

<sup>3</sup> *Gilmer v. Lime Point*, 18 Cal. 229; *Burt v. The Mutual Insurance Co.*, 106 Mass. 356.

<sup>4</sup> 91 U. S. 397.

post-office; Strong, J., saying that the better opinion was in accordance with the judgment in *Trombley v. Humphrey*,<sup>1</sup> that a State cannot take land which is not required for its own purposes, however much it may be needed for the General Government, because the right has its foundation in necessity, and can be exercised on no other ground.

Land ceded by the States is under the exclusive control of the General Government; but land acquired by purchase or the exercise of the right of eminent domain remains subject to the jurisdiction of the State, although occupied as a fort or for military purposes, and offences against its laws must, even when committed by persons in the service of the United States, be tried and punished by the State tribunals.<sup>2</sup> In the language of the case last cited, as adopted in the *Fort Leavenworth R. R. Co. v. Lowe*, "The right of exclusive legislation within the territorial limits of a State can be acquired by the United States only in the mode pointed out in the Constitution,—by purchase, by consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."

The principle that taxes shall not be laid save for a public end, applies with equal force to the right of eminent domain, which does not warrant the appropriation of land without the owner's consent where no public interest is involved, or, more accurately, unless the property is taken for some public duty which it is incumbent on the government to fulfil; and if this essential element is wanting, it matters not that the object for which the power is exercised is beneficial to the owner, and will compensate the loss.<sup>3</sup>

<sup>1</sup> 23 Mich. 471.

<sup>2</sup> *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525; *The People v. Godfrey*, 17 Johnson, 225.

<sup>3</sup> *Taylor v. Porter*, 4 Hill, 140, 148; In the matter of *Albany St.*, 11 Wend. 149; *Helm v. Webster*, 85 Ill. 116; *Pittsburg v. Scott*, 1 Pa. St. 309, 314; *Palairot's Appeal*, 67 Id. 479; *Eldridge v. Smith*, 34 Vt. 484; *Beekman v. The Schenectady R. R.*, 3 Paige, 45; *The West River Bridge Co. v. Dix*, 6 Howard, 507; *Butler v. The Supervisors*, 26 Mich. 29. The right to tax and the right of eminent domain stand in this regard

What the government may do in this regard directly, it may moreover do through an agency established for that end; and the right of eminent domain may consequently be delegated to an incorporated company, or to one or more individuals, for the construction of a railway or other work of a like kind, subject to the duty of keeping it open for public use when finished.

It is not easy to denote what constitutes a public use within the above principle; but it must in general be one in which the community are concerned or interested, although certain classes or individuals may derive a greater benefit than others. Land may be taken for a park or highway in one section of a State, although the inhabitants of the other sections do not customarily frequent the one, or pass over the other; and schools for children are not less public uses because the only advantage to adults who are childless, is the diffusion of knowledge that may render the community more prosperous and better fitted for self-government. Such is the established rule as regards taxation, and it applies to the right of eminent domain.<sup>1</sup>

The public should, moreover, have the actual use, occupation, or enjoyment of the land or property in question, — as by having the right of transit if it be a road, of repose and exercise if it be a park, of care and medical treatment if it be a hospital. It is not essential that the benefit should be universal, but it must not be confined to individuals or classes, and must be one which all who are in like circumstances may share.<sup>2</sup>

The bare fact that the general welfare will be promoted by the substitution of one mode of tenure for another, or the extinguishment of incumbrances that retard improvement and

on common ground; and a use that is not public as regards the power of taxation, — as, for instance, aiding a manufacturing company, — will not justify the taking of private property, even on full compensation made. *Cole v. La Grange*, 113 U. S. 1; *ante*, pp. 278, 283.

<sup>1</sup> *Kelly v. The City of Pittsburg*, 85 Pa. St. 170, 178.

<sup>2</sup> *Reeves v. Wood Co.*, 8 Ohio St. 333; *Palairot's Appeal*, 67 Pa. St. 479, 480.

hinder sales, is not such a public use as will warrant the exercise of the right of eminent domain.<sup>1</sup> Such legislation as the statutes passed during the last thirty years for the relief of Ireland indicate, may be constitutional in England, but is beyond the reach of a government which is in all its branches subject to the provision that no man shall be deprived of life, liberty, or property without due process of law.<sup>2</sup>

A moor, forest, or park cannot, therefore, be wrested from the owner, with or without compensation, for the purpose of being broken up into small farms or holdings and disposed of at public or private sale. Such a measure might replenish the treasury and bring land into cultivation which would otherwise be vacant, or give rise to a class of small freeholders who would be a restraint on popular excesses, but would not be within the power we are considering; and the same remark would apply to a law authorizing tenants to make improvements without the consent of their landlords, and providing that they shall not be ejected until the amount so laid out is repaid.

In *Palairot's Appeal* the legislature enacted that the irredeemable ground-rents which were at one time numerous in Pennsylvania, might be extinguished by the owners of the land contrary to the terms of the deed by which they were reserved; and it was contended that as the burden on the land was greater than the benefit to the holder of the rents, and tended to lessen market value and hinder sales, the statute was a valid exercise of the police power or of the right of eminent domain. The court held that such an enactment was, notwithstanding any benefit that might incidentally accrue to the community, a taking of property for private use which could not be sustained consistently with the constitutional provision that no one shall be arbitrarily deprived of what he owns.

It results from this decision that considerations of policy, or what relation between landlord and tenant is most advantageous to the State, are not a sufficient warrant for a recourse to a power which should be exerted only when some

<sup>1</sup> *Palairot's Appeal*, 67 Pa. St. 488.

<sup>2</sup> *Id.* 479.

specific thing is requisite for a public need which can be satisfied in no other way.

The objects of the power are various, and increase in number as civilization advances and the machinery of life and business becomes more complex. Among them may be enumerated public schools, parks, aqueducts, railways, turnpikes, and canals,<sup>1</sup> to which we may add court-houses, navy-yards, fortifications, and other structures erected by the government as a means of providing for the common defence and general welfare.<sup>2</sup> So telegraphy and the supply of water, gas, electricity, and steam for household use and as a means of warmth, light, or power, are public uses for which land may be taken, and so much of the streets and highways occupied as is requisite for the object in view.

In like manner, lakes or running streams may be appropriated as a means of furnishing a supply of water, and land taken for the necessary reservoirs and aqueducts.<sup>3</sup> So a dam may be constructed to improve the navigation of a river, or to operate as a feeder of a canal, because the object in both cases is a public one, — to facilitate the transportation of freight or passengers. The right to construct a dam and overflow the land on either side as a means of supplying water power for manufactures or for the purpose of irrigation, is more questionable, because in the one case the benefit is confined to the persons who use the power, and in the other to the land that is irrigated; and it has been said to make no difference that the government derives a revenue or exacts compensation from the owners of the ground or mills, because if this constituted a public use, land might be taken for any

<sup>1</sup> *Long v. Fuller*, 68 Pa. St. 173; *The Brooklyn Park v. Armstrong*, 45 N. Y. 234; *Higginson v. Nahant*, 11 Allen, 539; *The Owners v. The Mayor of Albany*, 15 Wend. 374.

<sup>2</sup> *Beekman v. The Saratoga & Schenectady R. R. Co.*, 3 Paige, 45, 74; *In re League Island*, 1 Brewster, 524; *Thorn v. Sweeney*, 12 Nev. 251; *Secombe v. The Railroad Co.*, 23 Wallace, 168; *Cotton v. The Mississippi Boom Co.*, 22 Minn. 372; *Lombard v. Stearns*, 4 Cushing, 60; *Wayland v. Middlesex*, 4 Gray, 500; *Kane v. Baltimore*, 15 Md. 240.

<sup>3</sup> *Lombard v. Stearns*, 4 Cushing, 60; *Whalen v. Middlesex*, 4 Gray, 500; *Cramer v. Baltimore*, 15 Md. 240.

purpose that would in the opinion of the legislature tend to render it more valuable, and enrich the community as a whole.<sup>1</sup>

It has nevertheless been held in other instances that the accumulation of water for manufacturing purposes or to propel the wheels of a grist-mill may be a public use, although its actual enjoyment is limited to a few mill-owners, because the effect is to render a vast amount of power available that would otherwise run to waste ;<sup>2</sup> and there can be little doubt that the improvement of navigation by the erection of a dam will not be less within the power of the legislature because the act incidentally provides that the surplus water may be sold or let for other useful purposes.<sup>3</sup>

So it can hardly be maintained that the irrigation by which a desert may be rendered fertile is not a public use, although the only persons who will be directly benefited are the proprietors of the soil.<sup>4</sup> Such an objection might be met by charging them with an amount sufficient to cover the expenditure, and thus blending the power of taxation with that of eminent domain ; as happens when the owners of the land through which a street is opened are assessed for the benefit resulting from the presumed increase of value, as a set-off against their right to compensation for the portion of which they are deprived.

The right to authorize one riparian owner to erect a dam on his own ground for manufacturing purposes, although the effect is to overflow other lands situate on the same stream, has been maintained on the collateral ground that where property in which several persons have a common interest that cannot be fully and beneficially enjoyed in its existing condition, the law may empower each of them to insist on measures

<sup>1</sup> *Buckingham v. Smith*, 10 Ohio, 96.

<sup>2</sup> See *Walcott Manuf. Co. v. Upham*, 5 Pick. 292 ; *Palmer Co. v. Farrell*, 17 Id. 58 ; *Commonwealth v. Essex Co.*, 13 Gray, 239 ; *Great Fall Manuf. Co. v. Fernald*, 47 N. H. 444 ; *Head v. Amoskeag Manuf. Co.*, 113 U. S. 9, 19 ; *ante*, pp. 287-291.

<sup>3</sup> *French v. The Manufacturing Co.*, 23 Pick. 220 ; *Hazen v. The Essex Co.*, 12 Cushing, 477 ; *Olmsted v. Camp*, 33 Conn. 532.

<sup>4</sup> *Wood v. Reeves Co.*, 8 Ohio St. 333.

which will promote its beneficial enjoyment as a whole; equitable compensation being made to any whose interests are prejudiced by the change.<sup>1</sup> Such is the principle on which tenants in common or of adjacent lands may be required to submit to a sale if the premises cannot be divided without loss, or to the erection of party-walls; and in the instances above cited, the proprietors of the bed and banks of a running stream were held to stand in a similar relation.<sup>2</sup>

Such is the view taken in the subjoined extract from the opinion of the court in the case last cited as delivered by Mr. Justice Gray.

“In the familiar case of land held by several tenants in common, or even by joint tenants with right of survivorship, any one of them may compel a partition, upon which the court, if the land cannot be equally divided, will order owelty to be paid, or in many States, under statutes the constitutionality of which has never been denied, will, if the estate is such that it cannot be divided, either set it off to one and order him to compensate the others in money, or else order the whole estate to be sold.<sup>3</sup> Water-rights held in common incapable of partition at law may be the subject of partition in equity, either by apportioning the time and extent of use, or by a sale of the right and a division of the proceeds.<sup>4</sup>

“At the common law, as Lord Coke tells us, ‘If two tenants in common, or joint tenants, be of an house or mill, and it fall in decay, and the one is willing to repair the same, and the other will not, he that is willing shall have a writ *de reparatione facienda*; and the writ saith *ad reparationem et sustentationem ejusdem domus teneantur*; whereby it appeareth that owners are in that case bound *pro bono publico* to maintain houses and mills which are for habitation and use of

<sup>1</sup> *Fiske v. Framingham Manuf. Co.*, 12 Pick, 68; *Bates v. The Iron Co.*, 8 Cushing, 548; *Head v. The Amoskeag Manuf. Co.*, 113 U. S. 9, 23.

<sup>2</sup> *Head v. The Amoskeag Manuf. Co.*, 113 U. S. 9, 23.

<sup>3</sup> *King v. Reed*, 11 Gray, 490; *Bentley v. Long Dock Co.*, 1 McCarter, 480; s. c. on appeal, *nom. Manners v. Bentley*, 2 McCarter, 501; *Mead v. Mitchell*, 17 N. Y. 210; *Richardson v. Monson*, 23 Conn. 94.

<sup>4</sup> *Smith v. Smith*, 10 Paige, 470; *De Witt v. Harvey*, 4 Gray, 486; *McGillivray v. Evans*, 27 Cal. 92.

men.’<sup>1</sup> In the same spirit, the statutes of Massachusetts for one hundred and seventy-five years have provided that any tenant in common of a mill in need of repair may notify a general meeting of all the owners for consultation, and that if any one refuses to attend, or to agree with the majority, or to pay his share, the majority may cause the repairs to be made, and recover his share of the expenses out of the mill or its profits or earnings.<sup>2</sup> And the statutes of New Hampshire for more than eighty years have made provision for compelling the repairs of mills in such cases.<sup>3</sup>

“The statutes which have long existed in many States authorizing the majority of the owners in severalty of adjacent meadow or swamp lands to have commissioners appointed to drain and improve the whole tract, by cutting ditches or otherwise, and to assess and levy the amount of the expense upon all the proprietors, in proportion to the benefits received, have been often upheld, independently of any effect upon the public health, as reasonable regulations for the general advantage of those who are treated for this purpose as owners of common property.<sup>4</sup>

“By the maritime law, based, as Lord Tenterden observed, on the consideration that the actual employment of ships is a matter not merely of private advantage to the owners, but of public benefit to the State, and recognized in the decisions and the rules of this court, courts of admiralty when the part-owners of a ship cannot agree upon her employment, authorize the majority to send her to sea on giving security to the dissenting minority to bring back and restore the ship, or,

<sup>1</sup> Co. Lit. 200 b.; 4 Kent’s Com. 370.

<sup>2</sup> Mass. Prov. Stat. 1709, ch. 3; 1 Prov. Laws (St. ed.), 641, and Anc. Chart. 388, Stat. 1795, ch. 74, sections 5-7; Rev. Stat. 1836, ch. 116, sections 44-58; Gen. Stat. 1860, ch. 149, sections 53-64; Pub. Stat. 1882, ch. 190, sect. 59.

<sup>3</sup> *Roberts v. Peavy*, 7 Foster, 477, 493.

<sup>4</sup> *Coomes v. Burt*, 22 Pick. 422; *Wright v. Boston*, 9 Cush. 233, 241; *Sherman v. Tobey*, 3 Allen, 7; *Lowell v. Boston*, 111 Mass. 454, 469; *French v. Kirkland*, 1 Paige, 117; *People v. Brooklyn*, 4 N. Y. 419, 438; *Coster v. Tidewater Co.*, 3 C. E. Green, 54, 68, 518, 531; *O’Reiley v. Kankakee Valley Draining Co.*, 32 Ind. 169.

if she be lost, to pay them the value of their shares ; and in such case the minority can neither recover part of the profits of the voyage, nor compensation for the use of the ship.<sup>1</sup> If the part-owners are equally divided in opinion upon the manner of employing the ship, then, according to the general maritime law recognized and applied by Justice Washington, the ship may be ordered to be sold, and the proceeds distributed among them.<sup>2</sup> But the right to the use of running water is *publici juris* and common to all the proprietors of the bed and banks of the stream, from its source to its outlet. Each has a right to the reasonable use of the water as it flows past his land, not interfering with a like reasonable use by those above or below or opposite him. One reasonable use of the water is the use of the power inherent in the fall of the stream and the force of the current to drive mills. That power cannot be used without damming up the water, and thereby causing it to flow back. If the water thus dammed up by one riparian proprietor spread over the lands of others, they could at common law bring successive actions against him for the injury so done them, or even have the dam abated. Before the mill acts, therefore, it was often impossible for a riparian proprietor to use the water-power at all without the consent of those above him. The purpose of these statutes is to enable any riparian proprietor to erect a mill and use the water-power of the stream, provided he does not interfere with an earlier exercise by another of a like right or with any right of the public, and to substitute for the common law remedies of repeated actions for damages and prostration of the dam, a new form of remedy, by which any one whose land is flowed can have assessed once for all, either in a gross sum or by way of annual damages, adequate compensation for the injury.”<sup>3</sup>

<sup>1</sup> Abbott on Shipping, pt. 1, ch. 3, sections 2, 3; Steamboat Orleans, 11 Pet. 175, 183; Rule in Admiralty, 3 How. vii.; The Marengo, 1 Lowell, 52.

<sup>2</sup> The Seneca, 18 Am. Jur. 485, s. c. 3 Wallace, Jr., 395; Story on Partnership, sect. 439; The Nelly Schneider, 3 P. D. 152.

<sup>3</sup> Head v. The Amoskeag Co., 113 U. S. 9, 20, 21.

It was said in *Reeves v. Wood County*,<sup>1</sup> in accordance with the decisions in some of the other States, that while the right of eminent domain may be exercised in order to drain or irrigate land which cannot be brought into cultivation without its aid,<sup>2</sup> such an appropriation is not justifiable unless it appears that it will promote the general welfare; and a statute authorizing trustees or commissioners to construct a ditch or an embankment as a means of drainage, at the instance of any two proprietors, without the consent of the party on whose land the work is done, or ascertaining that it is requisite for the public good, is in effect an authority to take property for private use,<sup>3</sup> and as such invalid.<sup>4</sup>

It has been held in some instances that land cannot be taken for a private way or railroad;<sup>5</sup> but agreeably to the authorities in Delaware and Pennsylvania, such ways may be laid out at the instance of the owner of a farm or manufactory, as a means of enabling him to cross the intervening land and reach a public road, because they are in effect branches of the highway, and it is not for the general good that land should be isolated, or the owner prevented from bringing his produce to market.<sup>6</sup> The rule has been treated as large enough to include a lateral railway leading from a manufactory to the main line on a navigable stream, because, as was said in *Palairé's Appeal*, such roads are auxiliary, and

<sup>1</sup> 8 Ohio St. 333; *ante*, p. 287.

<sup>2</sup> *Wilson v. Blackbird Creek*, 2 Peters, 245; *The Commonwealth v. Alger*, 7 Cushing, 86; *Dingley v. Boston*, 100 Mass. 544; *Tidewater Co. v. Coster*, 3 C. E. Green, 518; *Sigler v. Fuller*, 5 Vroom, 227; *Agurs v. The Mayor*, 35 N. J. Law, 172; 37 Id. 415. (The plaintiff's name in 37 N. J. Law, is *Agens*; *ante*, p. 292.)

<sup>3</sup> *Butler v. The Supervisors*, 26 Mich. 29; *Rutherford's Case*, 72 Pa. St. 82; *Agens v. The Mayor*, 37 N. J. Law, 415; *Deckey v. Tension*, 47 Mo. 373; *Taylor v. Porter*, 4 Hill, 146; *Reeves v. Wood Co.*, 8 Ohio St. 344.

<sup>4</sup> See *Philadelphia v. Scott*, 81 Pa. St. 80.

<sup>5</sup> *Taylor v. Porter*, 4 Hill, 140; *B. & N. Y. R. R. Co. v. Branard*, 9 N. Y. 100; *Bankhead v. Brown*, 25 Iowa, 540.

<sup>6</sup> *The Pocopson Road*, 16 Pa. St. 15; *Hickman's Case*, 4 Harrington, 580.

the public have the use of them for the purpose for which they are used.<sup>1</sup>

It is an indispensable condition that the private way or railway should connect with some public avenue or outlet;<sup>2</sup> and in the case last cited, an act of assembly authorizing the construction of tunnels under navigable streams for the more convenient mining of anthracite coal, was held to be unconstitutional, as sanctioning the taking of private property for a use which did not sufficiently concern the community.

If the public interest will be promoted by the exercise of the right of eminent domain, it matters not that individuals will also gain; and this doctrine has been carried to the questionable extent of bestowing franchises that might have been a lasting source of revenue, gratuitously on the first comers or persons who knew how to influence legislation. Had the lucrative privilege of constructing horse-railways through the streets of populous cities, and running locomotives on superstructures that overlook and darken dwellings, been leased for terms of years to the highest bidders, and compensation required for injuries to property, municipal taxation might have been lightened, and there would have been less occasion for complaints of injustice and favoritism.

The question whether the use is so far public as to justify the taking, is in the first instance for the legislature; but their decision is not final, and the case may be brought into court, when the question will then be, is the end public, and not whether the measure is judicious, or well calculated to attain the end.<sup>3</sup>

The appropriation of land for a court or State house cannot, for instance, be set aside because the judges think the site ill chosen, the cost excessive, or that the existing buildings afford the requisite accommodation; or — as the principle has some-

<sup>1</sup> 67 Pa. St. 484, 492. See Tiedeman, Police Power, p. 381.

<sup>2</sup> Keeling v. Griffin, 56 Pa. St. 305; Waddell's Appeal, 84 Pa. St. 90.

<sup>3</sup> Sigler v. Fuller, 5 Vroom, 227; The Tidewater Co. v. Coster, 3 C. E. Green, 518, 524; Agurs v. The Mayor, 35 N. J. 172, 37 Id. 415 (the plaintiff's name in 37 N. J. Law is Agens); Beekman v. The Saratoga R. R., 3 Paige, 73.

times been stated — if there be an element of public utility, it is not for the judiciary to consider its value or amount.<sup>1</sup>

There is nevertheless a preliminary inquiry: Is the use so far public that property can be taken consistently with the constitutional guaranties? These would be of little worth if the citizen could be deprived of his land or goods by labelling that public which is essentially private; and as this question is judicial, it may be considered by the courts, and the decision of the legislature reversed if manifestly unsound.<sup>2</sup>

It is not less clear that the object must be one which the government is entitled to effect directly under the powers intrusted to it for the common good; and land cannot therefore be constitutionally taken in this country for the erection of a building for public worship, nor, as it would seem, for an opera-house or a theatre.

It follows that the right of eminent domain cannot be exercised by the General Government for any end which is not expressly or impliedly within the scope of the enumerated powers of the United States; and as regards all municipal purposes belongs exclusively to the States, although it can never be legitimately so used by them as to prejudice or conflict with any right or power that is constitutionally possessed by Congress.<sup>3</sup>

If the purpose for which the power is exercised be public, it is immaterial that an individual or body corporate will also be benefited by the taking, and is delegated or authorized to carry it into effect; and hence the legislature may empower a company to construct a railway, turnpike, or canal over private property and collect the tolls. Although the citizen cannot employ his own means of conveyance on a railroad track as he might on an ordinary highway, the cars and carriages of the company are still open to all men at rates

<sup>1</sup> 2 Kent's Com. 340; *Beekman v. Saratoga R. R.*, 3 Paige, 45 or 71.

<sup>2</sup> *The Concord R. R. Co. v. Greely*, 17 N. H. 57; *Palairer's Appeal*, 67 Pa. St. 480, 488; *Rutherford's Case*, 72 Pa. St. 82; *Neponset Meadow Co. v. Tileston*, 133 Mass. 189.

<sup>3</sup> *Gilman v. Philadelphia*, 3 Wallace, 713, 726; *Bolland v. Hagan*, 3 Howard, 212, 230.

which should be uniform, and may be regulated by the State ; and hence the use may justly be regarded as public, although the corporation is private.<sup>1</sup>

Agreeably to the Fifth Amendment, property cannot be taken by the United States for public use without compensation ; and a similar provision may be found in the constitutions of the several States, while "damaged or destroyed" have recently been conjoined in some of the States with "taken." This clause, like the analogous language of the *habeas corpus* clause, may be regarded as a regulation of an inherent power, or as impliedly conferring a power that would not otherwise exist.<sup>2</sup> A provision that a power shall not be exercised except on certain conditions, implies that it may be exercised if the conditions are fulfilled.

Whichever interpretation is adopted, it would seem obvious that the right of eminent domain could hardly be exercised without compensation in the face of the language of the same amendment, drawn from Magna Charta, that no person shall be deprived of life, liberty, or property without due process of law, which, though originally intended to check the arbitrary power of the Crown, is a salutary restraint on all branches of our government.<sup>3</sup> Like provisions exist in the State constitutions, and their observance is now guaranteed by the Fourteenth Amendment of the Constitution of the United States.

We may therefore believe that compensation is a correlative, without which the right to take property for public use would be tantamount to confiscation, and would consequently be due if there were no constitutional guaranties.<sup>4</sup> For as

<sup>1</sup> *Beekman v. The Saratoga R. R. Co.*, 3 Paige, 45, 60, 75.

<sup>2</sup> *Taylor v. Porter*, 4 Hill, 143 ; *The West River Bridge Co. v. Dix*, 6 Howard, 507 ; *Sinnickson v. Johnson*, 2 Harrison, 129 ; *Gardner v. Newburgh*, 2 Johnson's Ch. 162.

<sup>3</sup> *Palairt's Appeal*, 67 Pa. St. 480.

<sup>4</sup> *Gardner v. Newburgh*, 2 Johnson Ch. 162 ; *Sinnickson v. Johnson*, 2 Harrison, 129 ; *The West River Bridge Co. v. Dix*, 6 Howard, 540 ; *Fletcher v. Peck*, 6 Cranch, 145 ; *Pumpelly v. The Green Bay Co.*, 13 Wallace, 177 ; *Raleigh & Gaston R. R. Co. v. Davis*, 2 Dev. & Bat. 451 ; *Hatch v. Vermont Central R. R. Co.*, 25 Vt. 49, 66.

eminent domain is, as we have seen, simply a right to compel the citizen to sell at a price ascertained according to some just method of computation, the obligation of the government to pay is not less clear than that of the owner to surrender.<sup>1</sup> Compensation has accordingly gone hand in hand with the right of taking property for public purposes in all civilized countries, and been regarded as essential to its legitimate exercise, even under despotic rule. They were treated as inseparable by the Continental jurists, and such is the principle and practice of the English government.<sup>2</sup> Such should obviously be the rule in the United States, because the right is not conferred in terms; and when powers arise by implication, it is also implied that they shall be exercised in conformity to the principles which the Colonists brought with them from England and sought to establish in the new land beyond the sea.<sup>3</sup> This was among the grounds assigned by the framers of the Constitution for not inserting a Bill of Rights; and if experience has shown that they erred, it was not so much from the insufficiency of the reason as because the restraints on despotic power should be formulated in terms that cannot be misunderstood.

The question arose in *Gardner v. Newburgh*,<sup>4</sup> under a statute authorizing the diversion of a stream for the purpose of supplying the village of Newburgh with water, without any provision for indemnifying the owners of the land through which it flowed; and it was held that the right to take and the duty of compensation were both plain, although the Constitution of New York contained no provision concerning either point. It was declared in like manner by Dayton, J., in *Sinnickson v. Johnsons*,<sup>5</sup> that the right to take property for public use antedated written constitutions, and was, under the settled doctrines of universal law, attended with a right

<sup>1</sup> *Gardner v. Newburgh*, 2 Johnson's Ch. 162, 166; 1 Blackstone's Com. 139; *ante*, p. 333.

<sup>2</sup> *Hatch v. The Vermont Central R. R. Co.*, 25 Vt. 65.

<sup>3</sup> *Wilkinson v. Leland*, 2 Peters, 657.

<sup>4</sup> 2 Johnson's Ch. 162.

<sup>5</sup> 2 Harrison, 129.

to compensation, which was so closely related that both should be regarded as parts of one and the same principle. It follows that if the Constitution is silent, and the statute makes no provision for compensation, it will be implied; or if the language excludes such a supposition, the act will be void.<sup>1</sup>

The measure of the compensation due for the appropriation of property to public use is *prima facie* its market value, or what it would have brought at a fair public or private sale, due regard being had to all the uses for which it was available, and that tended to enhance its price.<sup>2</sup> The question is more complicated where the appropriation is partial; and it may then be necessary to consider not only the value of what is taken, but the effect on what remains,<sup>3</sup> and allow for the detriment or advantage in assessing the damages.<sup>4</sup>

If one half of a lot is so much enhanced in value by the opening of a street over the other half that it will sell for more than the whole would have brought previously, the owner will have no right to indemnity, and may be compelled to pay the excess as an indemnification for any loss that may be occasioned to the adjacent lots.<sup>5</sup> In such cases the power of eminent domain and the power of taxation are both exercised, the first in taking the land for use as a street, and the second in requiring contributions from those who are especially bene-

<sup>1</sup> *Gardner v. Newburgh*, 2 Johnson's Ch. 162, 168; *Sinnickson v. Johnson*, 2 Harrison, 129; *Raleigh & Gaston R. R. Co. v. Davis*, 2 Dev. & Bat. 451.

<sup>2</sup> *Schuylkill Navigation Co. v. Thoburn*, 7 S. & R. 411; *Watson v. Pittsburg R. R. Co.*, 37 Pa. St. 469; *East Pennsylvania R.R. Co. v. Hottenstine*, 47 Id. 28; *Boom Co. v. Patterson*, 98 U. S. 403; *Hornstein v. The Atlantic R. R. Co.*, 51 Pa. St. 87.

<sup>3</sup> *Hatch v. Vermont Central R. R. Co.*, 25 Vt. 49, 66; *Watson v. The Pittsburg R. R. Co.*, 37 Pa. St. 469; *Schuylkill Navigation Co. v. Thoburn*, 7 S. & R. 411; *Symonds v. The City of Cincinnati*, 14 Ohio St. 147.

<sup>4</sup> *Shawneetown v. Mason*, 82 Ill. 337; *Bloomington v. Miller*, 84 Id. 621; *Hornstein v. The Atlantic & Great Western R. R. Co.*, 51 Pa. St. 87.

<sup>5</sup> *Livingston v. Mayor of New York*, 8 Wend. 85; *Owners of Ground v. Mayor of Albany*, 15 Id. 374.

fited, and who consequently ought to bear a corresponding share of the burden.<sup>1</sup>

The material inquiry is not what the owner will lose by the interruption of his business, or whether the property will be unfitted for the particular use to which he applied it, but what the effect will be on that general adaptability or fitness for the needs of life and trade which is at once the cause and test of value.<sup>2</sup>

In determining this point, the jury may hear and be guided by the testimony of experts as to the intrinsic value of the portion which is actually appropriated to public use. But it is also proper to consider the injurious or beneficial consequences to what is left, including the alteration that has been made in the configuration, depth, and frontage; the effect of a change of grade or embankment in rendering the property less suitable for trade or occupancy; whether the owner is shut out from a navigable stream or highway; does the advantage resulting from the street or railway compensate the detriment, — in short, whatever would influence the mind of a purchaser, and induce him to give more or less than before the power of eminent domain was exercised.<sup>3</sup>

Such a method of assessment is not necessarily dependent on the right to charge the owners of the property with "benefits," or tender a payment which is not pecuniary, but depends on the broad principle that compensation is to be gauged, in the absence of intentional wrong, by the loss resulting from the transaction as a whole.<sup>4</sup>

Accordingly, where a railroad was laid out across the plaintiff's land, and so near to his mill and to the highway leading

<sup>1</sup> *The People v. Mayor of Brooklyn*, 4 Comstock, 418; *ante*, p. 302.

<sup>2</sup> *Schuylkill Navigation Co. v. Thoburn*, 7 S. & R. 411; *Shenango & Alleghany R. R. Co. v. Braham*, 79 Pa. St. 447, 452.

<sup>3</sup> *Watson v. Pittsburgh R. R. Co.*, 37 Pa. St. 472, 476; *The East Pennsylvania R. R. Co. v. Hottenstine*, 47 Id. 28; *Hornstein v. Atlantic R. R. Co.*, 51 Id. 87; *Western Pennsylvania R. R. Co. v. Hill*, 56 Id. 460, 465; *Paige v. Chicago R. R. Co.*, 70 Ill. 324; *Hyde Park v. Dunham*, 85 Id. 575; *Shawneetown v. Mason*, 82 Id. 337.

<sup>4</sup> *Hyde Park v. Dunham*, 85 Ill. 575; *Paige v. Chicago R. R. Co.*, 70 Id. 324.

to it, that his customers could not drive with safety to the mill, or fasten their horses when there, the court held that the consequent loss of custom might properly be submitted to the jury as an item in the assessment of damages.<sup>1</sup> So the location of a railway in such proximity to a barn that the owner is in common prudence obliged to take it down, in order to avoid the risk of fire, and build it elsewhere, is a sufficient ground for compensation;<sup>2</sup> and an incidental injury to water-power is governed by the same principle.<sup>3</sup> So also when the appropriation of part of the land for use as the bed of a railroad will compel a tenant for life or years to carry on his trade or business in another place, the jury may take into consideration the cost of the removal of his machinery and the depreciation in value which it will undergo from being put up elsewhere, or applied to a different use.<sup>4</sup> In these instances the consequential damages were taken into view because part of the plaintiff's land was taken, and would, agreeably to the general current of decision, have been inadmissible had they arisen from acts done on the land of third persons, though equally injurious to the plaintiff, because there would then be no taking within the constitutional provision. It was at the same time held in *Hornstein's Case*<sup>5</sup> that the court below was right in instructing the jury not to consider the smoke, sparks, or light emitted by the locomotives, or their injurious consequences, including the effect which they might have in setting fire to the premises which the plaintiff used as a distillery, or frightening the horses which he employed for hauling. The reason assigned was that such damages were consequential; but the true ground seems to be that they were too remote and contingent to be ascertained with certainty.

It is established, in accordance with this decision, that in awarding compensation for the construction of a railroad,

<sup>1</sup> *The Western Pennsylvania R. R. Co. v. Hill*, 56 Pa. St. 460.

<sup>2</sup> *Wilmington R. R. Co. v. Stauffer*, 60 Pa. St. 374.

<sup>3</sup> *Barclay R. R. Co. v. Ingham*, 36 Pa. St. 194.

<sup>4</sup> *Getz v. Philadelphia R. R. Co.*, 105 Penn. 547; 113 Id. 214.

<sup>5</sup> 51 Pa. St. 87.

regard cannot be had to the risk of fire, although the road passes through the plaintiff's premises and will enhance the rate of insurance, because the use of such means being lawful, there is no liability for the consequences, save on the ground of negligence; and if that is shown, a recovery may be had subsequently in the proper form of action.<sup>1</sup> The inquiry in such cases, nevertheless, is what will the property sell for after the road is built, as contrasted with what it was worth before, due regard being had to all the circumstances; and in answering this question the jury may, as it would seem, consider every natural and probable consequence that would weigh adversely or favorably with a purchaser, — as, for instance, the risk, discomfort, and inconvenience arising from the proximity of the road, on the one hand, and the increased facility of transportation and access on the other.<sup>2</sup> As was said in these instances, taking one third of a tract may by reason of its situation or slope render the rest unmarketable; and it is not an answer that only so much is taken as the State actually requires. The jury are to consider not a partial effect only, but the whole, and take all the circumstances into view in arriving at a conclusion. This is not deducting benefits or advantages, or substituting compensation in land for money, but ascertaining whether the complainant is really damaged, and to what extent. The judgment in *Watson v. The Pittsburg & Connelsville R. R. Co.*<sup>3</sup> is to the same effect.

<sup>1</sup> *Philadelphia & Reading R. R. Co. v. Yeiser*, 8 Pa. St. 366; *Lehigh Valley R. R. Co. v. Lazarus*, 28 Pa. St. 203; *Huyett v. Philadelphia & Reading R. R. Co.*, 23 Pa. St. 373.

<sup>2</sup> *Hyde Park v. Dunham*, 85 Ill. 575; *Paige v. Chicago R. R. Co.*, 70 Id. 328; *Shawneetown v. Mason*, 82 Id. 337.

<sup>3</sup> 37 Pa. St. 472.

## LECTURE XIX.

Eminent Domain (*continued*). — The Property which may be the Subject of the Right. — Land. — Chattels. — Money. — Franchises. — Future or Contingent Interests. — Easements. — Diversion of Property from one Use to Another. — Power of the State over the Highways. — Railroad Tracks in Highways. — Vacation of Highways.

EVERY species of property, including money, may seemingly be appropriated by virtue of the right of eminent domain. The State may as well take the cash of a banker to pay its soldiers or enable them to march against the enemy, as woollens for clothing, or corn for food.<sup>1</sup> It has been suggested that such a course would be futile, because compensation must be pecuniary, and the government would be obliged to render with one hand what it took with the other.<sup>2</sup> The reason can hardly be deemed satisfactory, because payment need not be made forthwith or, in the case of the Commonwealth, secured; and the government may consequently wait for a reasonable time before returning what it has appropriated, with the interest which justice demands.<sup>3</sup> Such a taking would nevertheless be equivalent to a forced loan, and if not unconstitutional, should only be resorted to when the need is extreme, and supersedes ordinary rules.

Property which has been taken in the exercise of the right of eminent domain, may be appropriated by virtue of the same right to a different use, although it is held by a municipal or private corporation as a means of profit, and not merely for the general good. Such a franchise is property, or is con-

<sup>1</sup> Hatch v. The Vermont Central, 25 Vt. 49, 65; Vanhorne v. Dorrance, 2 Dallas, 304; *ante*, p. 304.

<sup>2</sup> Burnett v. Sacramento, 12 Cal. 76; The People v. The Mayor, 4 Comstock, 419; Cooley on Limitations, 526.

<sup>3</sup> Hammett v. Philadelphia, 65 Pa. St. 146, 153.

ferred by the State for some public end ; and in either aspect may be resumed by the donor, or transferred to other hands, subject to the duty of indemnifying those who are losers by the change.<sup>1</sup>

The rule of policy, as well as of law, is that a grant made for one public purpose may be superseded by another which is more urgent or important ; and if the deprivation is attended with an adequate compensation, there is no violation of public faith. It matters not that the franchise is conferred by a charter of incorporation, and within the doctrine that a contract cannot constitutionally be impaired, because it is also property, and therefore a fit subject for the exercise of the right of eminent domain.<sup>2</sup>

A toll-bridge erected under a charter granted for that purpose may accordingly be taken from the company and made free,<sup>3</sup> or one railroad company authorized to appropriate or occupy the road-bed of another, either by crossing it or by using it longitudinally, to the exclusion of the original grantees.<sup>4</sup>

Although a franchise may be abrogated, or transferred wholly or in part, without the assent of the owner, such an intention obviously should not be imputed to the legislature unless it is distinctly expressed, or it would be impracticable to execute the power in any other way.<sup>5</sup> Hence the incorporation of a company with power to construct a railway between two given points, may authorize the crossing or intersection of the intervening streets or highways, but will

<sup>1</sup> *Central Bridge Co. v. Lowell*, 4 Gray, 474; *The West River Bridge Co. v. Dix*, 6 Howard, 507; *Plan of Kensington*, 2 Rawle, 445.

<sup>2</sup> *New Orleans Gas Light Co. v. Louisiana Co.*, 115 U. S. 650, 673; *Enfield Toll Bridge Co. v. The Railroad*, 17 Conn. 40; *In re Twenty-second Street*, 102 Pa. 216.

<sup>3</sup> *In re Towanda Bridge Co.*, 91 Pa. St. 216; *Piscataqua Bridge v. N. H. Bridge*, 7 N. H. 35; *Black Constitutional Prohibitions*, § 72.

<sup>4</sup> *Sixth Avenue R. R. Co. v. Kerr*, 72 N. Y. 330; *Philadelphia & Trenton R. R. Co.*, 6 Wharton, 25; *Mercer v. Pittsburg*, 36 Pa. St. 99; *Cleveland R. R. Co. v. Speer*, 56 Pa. St. 325; *Snyder v. Penn. R. R.*, 55 Pa. St. 340, 344; *Danville R. R. Co. v. Commonwealth*, 73 Pa. St. 29; *Struthers v. Dunkirk R. R. Co.*, 87 Pa. St. 282.

<sup>5</sup> *Phillipps v. Dunkirk R. R.*, 78 Pa. St. 179; *Prospect Park R. R. v. Williamson*, 91 N. Y. 552; *The N. Y. & N. R. R. Co.*, 99 Id. 23.

not justify the location of the railway along the line of a public road, or the streets or avenues of a city.

In the *Cleveland Railroad v. Speer*,<sup>1</sup> the court nevertheless held that a railroad company might be authorized to use a street or highway expressly or inferentially,<sup>2</sup> and that such an authority would be implied where a corporation was empowered to continue an existing road up the valley of the Ohio River to Pittsburgh, and the power could not be carried into effect without traversing the borough of Manchester, which stood across the valley. It would obviously be less injurious to lay the tracks in the streets than to demolish the houses, and the power might therefore be properly executed in the former mode.

The provision that private property shall not be taken for public use without just compensation, sufficiently denotes that the persons within its scope are those interested in the land or chattel, and who will lose through its appropriation by the State.

It follows that every one who has a *jus in re* or *ad rem* present or prospective, vested or contingent, which is susceptible of valuation, has, if prejudiced by the appropriation of the thing itself, a just ground for compensation. The statutes of New York and some of the other States speak of the persons who are to be indemnified as the owner or owners; but this is simply a specification of what the Fifth Amendment of the Constitution of the United States implies, and is not intended to restrict the right to persons who own absolutely, or are entitled to the possession or occupation of the property in question.<sup>3</sup> The word "owner" has no technical meaning, and being *nomen generalissimum*, should, especially when used in a remedial statute, be construed liberally in favor of the parties whom it is the duty and intention of the legislature to protect.<sup>4</sup>

<sup>1</sup> 56 Pa. St. 325.

<sup>2</sup> *Commonwealth v. Erie R. R.*, 27 Pa. St. 339.

<sup>3</sup> *Trustees v. Robinson*, 12 S. & R. 29; *Story v. New York Elevated R. R.*, 90 N. Y. 124, 126; *Arnold v. Hudson R. R.*, 55 Id. 661.

<sup>4</sup> *Railroad Co. v. Boyer*, 13 Pa. St. 497, 499; *Watson v. Central R. R.*, 47 N. Y. 161; *Moeller v. Harvey*, 16 Phila. 66; *Schilt v. Harvey*, 105 Pa. 222.

Estates for life or years, vested or contingent, and whether in possession, remainder, or reversion, are equally property, within the meaning of the Constitution,<sup>1</sup> which also includes rents and easements issuing out of or constituting a charge on land;<sup>2</sup> and according to any just interpretation, mortgages, judgments, and, in fine, every right, title, lien, or interest which, if the land were sold under an execution and the proceeds paid into court for distribution, would entitle the holder to appear before the auditor or master and claim his share. A different view was nevertheless held in *Watson v. The Railroad*, where it was said that judgment-creditors were not within the scope of the statute, and might see the land upon which they relied as a means of payment swept away and the proceeds paid to the defendant in the judgment. This conclusion may be sound as regards the right of recovery against the city or company which takes the land; but the holder of the judgment should still be entitled to a bill in equity to enjoin the judgment-debtor from receiving the money, and compel him to appropriate it to the extinguishment of the debt.

It is obviously material to inquire what constitutes the property which the clause was intended to protect, and what the taking which it qualifiedly prohibits. These inquiries are so closely related that it is not easy to disentangle them; but they must be severally considered if we wish to arrive at a correct result. To illustrate by examples: if we suppose a stream flowing through three farms owned severally by A, B, and C, and that B's land is flooded by the construction of a railroad or other public work on the farm of C, there can be no doubt that B's property is injured; and the question, Is it taken? should according to the recent course of decision

<sup>1</sup> *Baltimore R. R. v. Thompson*, 10 Md. 76; *Railroad Co. v. Boyer*, 13 Pa. St. 497; *Turnpike Co. v. Brosi*, 22 Pa. St. 29; *Philadelphia & Reading R. R. Co. v. Getz*, 113 Id. 214; *North Penn. R. R. v. Davis*, 26 Pa. St. 238; *Brown v. Powell*, 25 Id. 229; *Parks v. Boston*, 15 Pick. 198.

<sup>2</sup> *Bridge Co. v. Hartford R. R.*, 17 Conn. 454; *Watson v. Central R. R.*, 47 N. Y. 161; *Cuthbert v. Kuhn*, 3 Wharton, 365; *Workman v. Mifflin*, 30 Pa. St. 362.

receive an affirmative reply.<sup>1</sup> If, on the other hand, the stream were diverted from B's farm for the purpose of feeding a canal conferred by the State, by a sluice constructed on A's, the doubt would be, not as to the taking of the water, but whether B's right to require that it shall continue to run as it was wont to do, amounts to ownership, which, agreeably to well-settled principles, must be decided in his favor.<sup>2</sup> If we now suppose the street in front of B's house in town to be obstructed by an elevated railroad built under an authority from the State, both questions will be presented: Has he a right of property in the street? Is the darkening of his windows a taking of his property in the house? and he may be entitled to judgment on either or both grounds.<sup>3</sup>

There are nevertheless authorities which point to the opposite conclusion,—that while there may be grievous loss in each of the cases above supposed, there is no such taking in the second or third as the Constitution contemplates. The question must therefore be examined in the light of principles.

The term property may be used to signify the thing owned or possessed, or the rights and privileges which together make up the aggregate of use or enjoyment implied in ownership.<sup>4</sup> Property may therefore justly be defined as “the dominion or indefinite right of user or disposition which one may exercise over particular things or subjects.” This is its appropriate meaning, and that which it has in the Constitution; although it is not infrequently used to indicate the thing rather than the right, and much of the uncertainty and confusion observable in the decisions have arisen from overlooking this distinction.<sup>5</sup>

<sup>1</sup> *Pumpelly v. The Green Bay Co.*, 13 Wallace, 166; *Bridge Co. v. The United States*, 105 U. S. 502; *Eaton v. Railroad Co.*, 51 N. H. 504.

<sup>2</sup> *Gardner v. Newburg*, 2 Johnson's Ch. 162; *Heiman v. Union Canal Co.*, 50 Pa. St. 268; *Smith v. City of Rochester*, 92 N. Y. 473; *Yates v. Milwaukee*, 10 Wallace, 504.

<sup>3</sup> *Story v. The Elevated R. R. Co.*, 90 N. Y. 157, 170; *Crawford v. The Village of Delaware*, 7 Ohio St. 459.

<sup>4</sup> *Railroad Co. v. Boyer*, 13 Pa. St. 497, 499.

<sup>5</sup> *Rigney v. Chicago*, 102 Ill. 77. The distinction is sometimes over-

Such manifestly is the true interpretation of the Federal Constitution, because the same amendment which guarantees the right to compensation where property is taken for public purposes, provides that no person shall be deprived of life, liberty, or property without due process of law. A man who is precluded from exercising his right over or to a thing is obviously deprived of his property in the thing, and the term presumably has the same meaning throughout the clause; or, to state the case somewhat differently, the intention was to forbid the abrogation of private rights absolutely for private purposes and relatively for public purposes, and that which would be a deprivation if done for a private use must be attended with compensation, though done for a public end, and will be unconstitutional unless the condition is observed. Whenever, therefore, the right of an individual over or to a thing, is hindered or rendered less valuable by an alteration in the physical condition of the thing resulting from an act done under an authority conferred by the legislature, his property in the thing is taken, although he never possessed the thing, or although it remains in his possession.<sup>1</sup> "All persons having proprietary rights are entitled to compensation, because the aggregate of those rights makes up the fee."<sup>2</sup>

The interest of a tenant under a covenant for the renewal of the lease, or of a purchaser in the fulfilment of a written agreement to convey, is consequently an ownership which entitles him to compensation for any act, public or private, by which it is abrogated or impaired;<sup>3</sup> and so is the right to an

looked by writers of great authority. Thus, when a nuisance is defined as "anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another" (3 Blackstone, Com. 216), the meaning obviously is anything done to the hurt or annoyance of another as the owner or occupant of lands, tenements, or hereditaments.

<sup>1</sup> *Crawford v. Delaware*, 7 Ohio St. 459; *Arnold v. Hudson R. R.*, 55 N. Y. 661; *Trustees v. Robinson*, 12 S. & R. 29; *Rigney v. Chicago*, 102 Ill. 77; *Stone v. Railway Co.*, 68 Id. 394; *Richardson v. Vermont R. R.*, 25 Vt. 465, 471; *Watson v. Central R. R.*, 47 N. Y. 157.

<sup>2</sup> *Watson v. Central R. R.*, 47 N. Y. 157; *Richardson v. Vermont R. R.*, 25 Vt. 465, 467.

<sup>3</sup> *North Pennsylvania R. R. v. Davis*, 26 Pa. St. 238.

artificial watercourse, or to a common appurtenant in ground belonging to another person, or to the State.<sup>1</sup>

It results from what has been said that "taking" is material only so far as it affects some private right, and that every valuable right is equally entitled to protection, whether it is to the possession or occupation of land, or that it shall remain open as a means of passage, or to give access to light and air.<sup>2</sup> It is immaterial that the private right grows out of an act or contract by which the land is dedicated to the public, because both uses may be, and not infrequently are, coincident, — as where two or more persons unite in laying out a public square in a town or village,<sup>3</sup> and each has a several right to require that the covenant shall be observed, which is concurrent with the public right against all.<sup>4</sup> So the right to the water which flows through land, and the right of way over it, are not less real than the right to cultivate the surface of the ground, or the right to the minerals which lie beneath.<sup>5</sup> Each is property, and cannot be obstructed by the Commonwealth without a deprivation which is equivalent to taking, whether the obstruction is caused by an act done on the land or elsewhere, and whether the land belongs to the holder of the right, or to some other person.<sup>6</sup>

It is established, in conformity to this principle, that incorporeal hereditaments — including commons, ways, water-courses, rents, and franchises — though not tangible, and for

<sup>1</sup> *Arnold v. Hudson R. R.*, 55 N. Y. 661; *Story v. N. Y. Elevated R. R.*, 90 Id. 167; *Trustees v. Robinson*, 12 S. & R. 29; *Fleming's Appeal*, 65 Pa. St. 444.

<sup>2</sup> *Doyle v. Lord*, 64 N. Y. 432; *Story v. N. Y. Elevated R. R.* 90 N. Y. 168.

<sup>3</sup> *Hills v. Miller*, 3 Paige, 256.

<sup>4</sup> *Parker v. Framingham*, 8 Metcalf, 260; *Kirkham v. Sharp*, 1 Wharton, 323; *Faust v. Pass. R. R.*, 3 Philadelphia, 164; s. c. 2 *Smith's Leading Cases* (8 Am. ed.), 181; *Trustees v. Cowen*, 4 Paige, 510; *Story v. N. Y. Elevated R. R.*, 90 N. Y. 166.

<sup>5</sup> *Heilman v. Union Canal Co.*, 50 Pa. St. 268; *Hatch v. Vermont Central R. R.*, 25 Vt. 49, 69; *Smith v. Rochester*, 92 N. Y. 473; *Gardner v. Newburg*, 2 Johnson's Ch. 162.

<sup>6</sup> *Story v. Elevated R. R.*, 90 N. Y. 167; *Trustees v. Robinson*, 12 S. & R. 29; *Fleming's Appeal*, 65 Pa. St. 444.

the most part issuing out of or exercised on the lands of others, are as much property that may not be taken without payment as if they were corporeal and susceptible of manual possession.<sup>1</sup> If, therefore, the State or railway company take land which is subject to a rent-service, they must compensate the landlord ; and so of the obstruction of a right of way or watercourse by a railroad or other public work constructed by virtue of the right of eminent domain.<sup>2</sup>

An easement is a right to use that for a particular purpose which belongs for general purposes to another, and is not only consistent with, but necessarily implies, the existence of a distinct and underlying title to the ground which is subjected to the burden. When, therefore, a right of way is granted over land, the grantor and grantee are both owners, and neither can do any act that will vary or impair the right of the other. The principle is the same whether the grant is made to the State or to an individual, and although the easement grows out of the exercise of the right of eminent domain. The laying out of a street consequently gives rise to two co-existent rights of ownership, — one belonging to the Commonwealth, and the other to the owner of the land over which it passes.<sup>3</sup> The fee remains in him, and the State can do no act that will impose an additional burden, without a new exercise of the right of eminent domain attended with compensation.<sup>4</sup> This is a general rule applicable to all easements, whether public or private, and which consequently includes highways.<sup>5</sup>

It is established, in conformity to these principles, that land which has been taken for a street may not be appropriated to

<sup>1</sup> *Heilman v. Union Canal Co.*, 50 Pa. St. 268; *Trustees v. Robinson*, 12 S. & R. 29; *Fleming's Appeal*, 65 Pa. St. 444; *Story v. N. Y. Elevated R. R.*, 90 N. Y. 122; *Bridge Co. v. Hartford R. R.*, 17 Conn. 454; *Smith v. Rochester*, 92 N. Y. 478; *Cuthbert v. Kuhn*, 3 Wharton, 365; *Workman v. Mifflin*, 30 Pa. St. 352.

<sup>2</sup> *Arnold v. Hudson R. R.*, 55 N. Y. 661; *Smith v. Rochester*, 92 N. Y. 473.

<sup>3</sup> *Dovaston v. Payne*, 2 Smith's Leading Cases (8 Am. ed.), 140.

<sup>4</sup> *The Ridge Turnpike Co. v. Stoevers*, 6 W. & S. 378; *Mifflin v. The Railroad*, 16 Pa. St. 182, 194.

<sup>5</sup> *Jessup v. Loucks*, 55 Pa. St. 350; *post*, p. 372.

any purpose which is incompatible with its primary use as a means of transit, and will prejudice the owner of the underlying soil.<sup>1</sup> The legislature cannot, therefore, authorize the erection of a police-station, school-house, or other public building in the highway, or even of a freight-depot or car-house; and still less could it throw the land into the market and dispose of it as a building site.<sup>2</sup> Such an act is a taking, and can be effected only through the power of eminent domain, attended with compensation to the proprietors of the fee.

So far all the authorities agree; but there is a wide divergence of opinion as to what is such a departure from the appropriate uses of a street as to bring the case within the principle, and while some of the cases hold that a track may be laid for the passage of trains and locomotives, at all events where the fee is in the State or city, it has been decided in others that occupying an urban highway with the cross-ties, rails, and sleepers of a railroad, and thus rendering it unfit for use as a street, is not the same but an essentially different easement, which renders the highway less available for ordinary purposes, and impairs the value of the adjacent land. An appropriation of land for use as a street, whether through a dedication or under the power of eminent domain, is not an appropriation of it as a railway, and will not, agreeably to this view, justify the occupation of it for such a purpose.<sup>3</sup>

It is immaterial as regards the principle whether the land is given voluntarily or taken under the right of eminent domain. If the owner dedicates the land, it is for the customary uses of a street; if it is condemned, such also is the end in view.<sup>4</sup>

<sup>1</sup> *The Trustees v. The A. & R. R. Co.*, 3 Hill, 567; *The Indianapolis R. R. Co. v. Hartley*, 67 Ill. 439; *The Board of Trade Telegraph Co. v. Barrett*, 106 Id. 507.

<sup>2</sup> *Mahady v. The Railroad Co.*, 91 N. Y. 148; *Story v. The Railroad Co.*, 90 Id. 122; *Lackland v. The North Missouri R. R. Co.*, 31 Mo. 180; *Barney v. Keokuk*, 94 U. S. 324; *The Ridge Turnpike Co. v. Stoevers*, 6 W. & S. 378.

<sup>3</sup> *Williams v. New York Central R. R. Co.*, 16 N. Y. 97.

<sup>4</sup> *The Board of Trade Telegraph Co. v. Barnett*, 107 Ill. 507; *The Indianapolis R. R. Co. v. Hartley*, 67 Id. 439, 444.

To convert a common highway over a man's land into a railroad is therefore to impose an additional burden upon the land which greatly impairs its value, considered as a whole, and if the owner is not compensated, his consent must be proved. It cannot be said with truth that in assenting to the laying out of the highway upon his land he consented to the building of a railroad upon it, because they are essentially different. The one benefits his land, renders access to it easy, and enhances the price; while the other makes access to it difficult and dangerous, and renders it comparatively valueless. Nor can it justly be contended that a railway is merely an improved highway. A highway is open to all the world, and every man who owns a horse and wagon may travel on it at his pleasure; a railway is reserved for the carriages of the company, and no one can use them without paying for them. The purposes are therefore not only different, but inconsistent, because wherever the railroad track extends, the public cannot walk or drive with safety, and the railway company have not only a paramount but an exclusive right.

Were the transaction between individuals, every one would see the injustice of such a conclusion. The doubt arises from the supposition that the public interest is involved; and it was to guard against the bias arising from this source that the Constitution interfered to protect the citizen. It follows that the dedication of land as a street does not preclude the owner from bringing trespass or ejectment, or obtaining an injunction against a railway company which is about to enter upon and occupy the way, and that the company cannot rely upon a grant from the legislature and the license or consent of the municipality as a justification.<sup>1</sup>

The main current of the authorities is in accordance with this decision,—that where the public have only an easement, and the soil of the street belongs to the owners of the abutting lots, it cannot be obstructed by a steam railroad without

<sup>1</sup> The Indianapolis R. R. Co. v. Hartley, 67 Ill. 507; Bissell v. The New York Central R. R. Co., 25 N. Y. 442; Wager v. The Troy R. R. Co., 25 Id. 526, 532.

indemnifying the persons whose property is rendered less valuable or available by the change.<sup>1</sup>

In *Kucheman v. The Railroad Co.*<sup>2</sup> the company defendant had constructed a railway on the street in front of the plaintiff's dwelling. He owned the fee to the middle, and the court held that to enable him to recover compensation under the statute law of Iowa "it must appear that the defendant has taken and holds the plaintiff's real estate. The defendant's theory is that it has not done so. Its claim may be stated in the words of the court in *The Morris & Essex R. R. Co. v. The City of Newark*:<sup>3</sup> 'It is the easement only which is appropriated, and no right or title of the owner interfered with.' It is true, of course, that it is an easement only which is appropriated; but whether it is the easement only to which the land was already subject, is the question in the case.

"We are of the opinion that it is an additional easement. Where land is taken for a street or highway, and damages are allowed, should they be estimated upon the supposition that the street or highway will be used for a railroad? Certainly not, for two reasons: not one street in a hundred is, or ever will be, so used, and it would be improper to allow the land-owner for damages which he probably will never sustain. Again, if it were certain that he would sustain such damages, the railroad company, and no one else, should pay them. Upon no principle of law can it be presumed that a person whose land has been taken for a street or highway has been paid for the easement which a railroad company enjoys in a street or highway upon which it constructs and operates its track. Upon what ground then can the land-owner's right of recovery be denied? Can it be denied on the ground of the necessity of reducing the cost of the railroad because it is a great and desirable improvement? No

<sup>1</sup> *Ford v. The Railroad Co.*, 14 Wis. 616; *Pomeroy v. The Railroad Co.*, 16 Id. 640; *Craig v. The Rochester City R. R. Co.*, 39 N. Y. 404; *Imlay v. The Railroad Co.*, 26 Conn. 249; *Springfield v. The Conn. R. R. Co.*, 4 Cushing, 71; *Kucheman v. The Railroad Co.*, 46 Iowa, 366; *The Indianapolis R. R. Co. v. Hartley*, 67 Ill. 439.

<sup>2</sup> 46 Iowa, 366.

<sup>3</sup> 2 Stockton, Ch. 352.

one would claim that. Yet it is to be apprehended that the importance of railroads in the improvement of the country has been regarded as such that courts have sometimes been unconsciously influenced to deny what must appear to every mind as true as an abstract proposition, that the construction and operation of a railway track upon a street or highway is an additional servitude. A part of the difficulty, no doubt, has grown out of the doctrine in *Hatch v. The Vermont R. R. Co.*,<sup>1</sup> above cited, and the other cases, which hold that no recovery can be had, however great the injury, if no part of the injured person's premises have been taken, and the cause of the injury does not constitute a nuisance.' The rule as held in those cases is undoubtedly the law, although its operation sometimes produces a great hardship. Of such hardships the case of *Slatten v. Des Moines Valley R. R. Co.*<sup>2</sup> is a striking illustration."

In such cases the taking is partial of so much of the land of the abutting owners as extends under and to the middle of the street, and the amount of the compensation consequently depends not merely on the value of the ground covered by the track, but on the effect which the construction of the railway will have on the residue, or, in other words, on what the property will sell for before and after the appropriation.<sup>3</sup>

As the title of an abutting owner does not extend beyond the middle of the highway, and he has, agreeably to the view taken in these instances, no property in the street as such, he is not entitled to damages for any obstruction which is not immediately in front of his premises and on the side of the street which belongs to him; and in *Kucheman v. The Railroad Co.* it was said to follow that the plaintiff could not recover more than a moiety of the loss which he had sustained from the construction of a railway in the street opposite his house, because the rails were laid on either side of the medial line, and one half only of the track rested on his ground. Such a distinction is at the best logical rather than

<sup>1</sup> 25 Vt. 49.

<sup>3</sup> *Kucheman v. The Railroad Co.*, 46 Iowa, 366.

<sup>2</sup> 29 Iowa, 148.

just; and the court does not seem to have considered that one who is compelled to part with what belongs to him should be placed pecuniarily in the same position as if the power had not been exerted, and may therefore reasonably require that the entire detriment should be taken into view in assessing damages.

The doctrine that land which has been taken by the public as a street, or subjected to a specific charge or easement of any kind, cannot be devoted to a different use to the detriment of the owner of the soil, is also recognized in New Jersey,<sup>1</sup> and was held, in *The State v. Laverack*,<sup>2</sup> to preclude the occupation of the street as a market-place, which would render it less available for general use. The court said that to permit ground to be subjected to a different burden from that for which the owner has been compensated, without inquiring whether he will be prejudiced, would be a mere evasion of a fundamental rule intended for the protection of the citizen, and which should not be so interpreted as to frustrate its object. The appropriation of land to the ordinary purposes of a street often tended to improve the adjacent property, while the conversion of the street into a market might destroy its value. Few things could, therefore, be more unjust than where land had been paid for on the assumption that it would be applied to the former purpose, to allow it to be used, without compensation, for the latter.<sup>3</sup>

The question, what changes in the public right of way amount to a taking or deprivation, depends on the nature of the means employed and the effect produced; and it has been held that the construction of a tramway for carriages to be propelled by horses, or even by some modified application of steam, will not entitle the owner of the adjacent land to compensation if it does not materially impede the public right of passage or the use of the ordinary vehicles.<sup>4</sup>

<sup>1</sup> *Hinchman v. The Paterson Horse R. R. Co.*, 2 C. E. Green, 76.

<sup>2</sup> 34 N. J. 201.

<sup>3</sup> *State v. Laverack*, 34 N. J. 201.

<sup>4</sup> *Hinchman v. Paterson Horse R. R.*, 2 C. E. Green, 75; *Hobart v. Milwaukee*, 27 Wis. 194; *Peddicord v. The P. R. Co.*, 34 Md. 463; *The*

A horse-railway may, agreeably to these decisions, be laid over land which has been opened as a street, because such a use is nearly identical with that of an ordinary highway. The motive power is the same, and the noise and jarring no greater, and ordinarily less, than that produced by carts and omnibuses. Although the nature of the use is somewhat different as it respects the public, it does not prejudice the adjacent landowners or render their property less valuable than it was before the track was laid.

After some debate the New York courts arrived at the opposite conclusion,—that the difference between a steam and a horse railway is one of degree, and that as each interferes with the customary and appropriate use of the streets as such, so compensation is due to the owner of the abutting land for both.<sup>1</sup>

The authorities agree that to maintain a claim for compensation for a change in the grade of a street, or its appropriation to a different use by virtue of an authority delegated by the State, the plaintiff must possess some right in or to the street distinct from that of the community as a whole, and that where none such exists, his property is not taken, and he must bear the loss. It has been held to follow from this principle that where the taking or dedication of land as a street is absolute, and transfers the freehold, the owner must be presumed to have been compensated for his entire right or interest in the land, and cannot complain of any use or purpose to which it may be appropriated by the State, however diverse from that to which it was originally applied. The distinction is, agreeably to this view, between the ordinary laying out of a highway, which leaves the title to the soil to the middle of the roadway in the proprietors on either side, subject to the public easement, and a grant or taking which passes all that lies beneath the surface of the ground, as well as everything that stands above. There can, it is

*Ohio Street Railway v. Cummins*, 14 Ohio St. 523; *Elliot v. The Fairhaven R. R. Co.*, 32 Conn. 579; *The People v. Kerr*, 27 N. Y. 188; *The Attorney-General v. The Metropolitan R. R. Co.*, 125 Mass. 515.

<sup>1</sup> *Wager v. The Troy R. R. Co.*, 25 N. Y. 529.

said, under these circumstances, be no subsequent taking, because the State has already acquired the whole, and may appropriate what has become her own to any use which she thinks proper.<sup>1</sup>

This is not because the legislature can arbitrarily sanction an invasion of private right, but because the charter operates as a waiver of the public right, and authorizes the railroad company to do whatever may be done by a private owner on his own ground; and hence if they keep to the limits within which every one may prosecute his business without being answerable for the effect on others, there is no nuisance, and the neighboring proprietors have no legal cause of complaint.

It was declared in *Kerr v. The Railroad Co.*,<sup>2</sup> in accordance with the above doctrine, that the right to compensation for the occupation of a street by a railway depends on whether the ground over which the street is laid out belongs to the owners of the building lots, or has been acquired absolutely by the city. In the former case, the laying of the track is the exercise of a larger right than that acquired by the opening of the street, and the owners of the land on either side are entitled to damages for the deprivation of a benefit for which they have not infrequently paid in full, and the imposition of a burden for which they have not been compensated; in the latter, the city is within the rule that an owner may use his land for any lawful purpose, without being responsible for the consequential injury to others.

The fallacy of this distinction is that it begs the question in dispute. It was conceded that the title of the city was not absolute, but subject to a specific trust that the land should be appropriated and used forever as a street. If such a use includes the right to lay a railway track at grade, or, if the legislature so pleases, to elevate it on trestles which obstruct the carriage way and command the windows of the dwellings on either side, it is immaterial that the city has a mere easement, and not a fee. If, on the other hand, the

<sup>1</sup> *Hatch v. The Vermont Central R. R. Co.*, 25 Vt. 49, 63; *Richardson v. The Vermont Central R. R. Co.*, Id. 465, 473.

<sup>2</sup> 27 N. Y. 188.

occupation of a street by trains and locomotives is repugnant to its appropriate use as a street, it cannot be applied to the former use without a breach of the trust to devote it exclusively to the latter.

The injustice of appropriating land which has been taken from an unwilling vendor for less than it is worth, on the faith of an express or implied assurance that it will be used in a way to benefit him, to a different and detrimental use, is obviously the same whether the State has a mere easement, or has acquired the fee or ownership of the soil.

The courts of Pennsylvania accordingly push the argument to its logical conclusion, by holding that the street may be converted into a railway track without compensation, whether the public have the fee or a mere right of passage, and although indemnity was withheld when the street was opened, on the plea that the owner would be benefited by its use as a highway and the increase of traffic.

Although the doctrine of *Kerr v. The Railroad Co.* has been discarded in New York, it prevails in some of the States, and is summed up in *Dillon on Municipal Corporations* as follows: "If the fee in the streets or highways is in the public, or in the municipality in trust for public use, and is not in the abutter, the doctrine seems to be settled that the legislature may authorize them to be used by a railway company in the construction of its road, without compensation to adjoining owners or to the municipality, and without the consent and even against the wishes of either.<sup>1</sup> But where the public have only an easement in the street or highway, it has been generally held that against the proprietor of the soil the use of the street or highway for the purpose of a steam railroad is an additional burden which, under the constitutions of the different States, cannot be imposed by the legislature without compensation to such proprietor for the new servitude."<sup>2</sup> Such a conclusion may be sound on general princi-

<sup>1</sup> *Moses v. The Pittsburgh, Fort Wayne, & Chicago R. R. Co.*, 21 Ill. 522; *Stone v. The Railroad Co.*, 68 Id. 394; *Stetson v. The Chicago R. R. Co.*, 75 Id. 75.

<sup>2</sup> *Dillon on Municipal Corporations* (4th ed.), p. 697; *Kellenger v. The*

ples, but is scarcely applicable to the appropriation of part of a tract as a street, because whether the title to the soil does or does not remain with the owner, it is charged with a public right of way which he shares, and may be more advantageous to him by increasing the value of the residue of the tract than it is to the community.<sup>1</sup> The benefit may consequently be set off against the value of the land in assessing the damages, and there is an implied agreement that the street shall not be applied to any purpose that will impair its usefulness as a highway or render the adjacent land less valuable for sale or habitation. Such a taking is, as we have seen, a compulsory sale, the consideration on one side being the acquisition of the land; on the other, wholly or in part, the opening of the street, and consequent benefit to the adjacent land. What the public acquires, therefore, depends on what it buys and pays for, which may be either the fee simple, a qualified fee, an easement merely, or a right to occupy the land temporarily or for a specific use or purpose.<sup>2</sup>

The appropriation of land by virtue of the right of eminent domain is virtually a contract which is not the less obligatory on the State because the owner cannot withhold his assent, and what it transfers depends on the intent as deduced from the circumstances; and as the rights on either side become fixed on the completion of the transfer, they cannot be varied or enlarged save by a further exercise of the right. Turning ground which has been taken for a street into a canal or railroad is therefore a material alteration which operates

Railroad Co., 50 Id. 206; *Slatten v. The Des Moines Valley R. R. Co.*, 29 Iowa, 148; *Tomlin v. The Dubuque R. R. Co.*, 32 Id. 106; *Kucheman v. The Railway Co.*, 46 Id. 366, 377. See also 2 *Smith's Leading Cases* (8 Am. ed.), 167, 170, 173; *Holmes v. Bellingham*, 7 C. B. (N. S.), 329; *Peck v. Smith*, 1 Conn. 103; *Paul v. Carver*, 26 Pa. St. 223; *Smith v. Slocomb*, 9 Gray, 36; 7 Id. 280.

<sup>1</sup> *Dovaston v. Payne*, 2 *Smith's Leading Cases* (8 Am. ed.), 144.

<sup>2</sup> *Haldeman v. The Penn. R. R. Co.*, 50 Pa. St. 425, 436; *Craig v. Allegheny*, 52 Id. 477; *Kucheman v. The R. R. Co.*, 46 Iowa, 366; *Pittsburgh v. Brown*, 102 Pa. St. 23; *Hayward v. New York*, 3 *Selden*, 314; *Sixth Ave. R. R. v. Kerr*, 72 N. Y. 333; *Story v. The N. Y. Elevated R. R. Co.*, 90 Id. 123, 172.

as a second taking, and can no more be effected without compensation than could the first.<sup>1</sup> It is only where the land is acquired in fee simple absolute, free from any trust or duty which the courts can recognize and enforce, that it becomes a part of the public domain which may be disposed of as the legislature think proper.<sup>2</sup>

The material inquiry, therefore, is not, did the city acquire the fee, or simply a right of way or easement, but have the abutting owners a right or privilege which partakes of the nature of property and may not be impaired without compensation; and in the absence of proof much may depend on whether the construction of the road entered into and formed part of the consideration for the taking of the land; for if so, there is an implied stipulation that the street shall not undergo any material change that will unfit it for the uses to which urban highways are ordinarily applied. Whether the owner parts with the easement and retains the fee, or parts with the fee and retains an easement, he is equally entitled to require that nothing shall be done in derogation of the true intent and meaning of the transaction as deduced from the circumstances.<sup>3</sup>

It does not necessarily vary the case that the public title is conferred instead of being taken under the right of eminent domain, nor that the grant is voluntary without a consideration given or received; if the dedication is expressly or impliedly for a street, the land cannot be applied to any other purpose without a breach of trust. A strip or belt so acquired, obviously could not be occupied as a railway in the first instance, to the exclusion of the ordinary means of traffic, without a manifest breach of faith; and the wrong is nearly as great when it is laid out as a street, and subsequently converted into a railway.<sup>4</sup>

<sup>1</sup> *The Railroad Co. v. Schurmeier*, 7 Wallace, 272; *Story v. The N. Y. Elevated R. R. Co.*, 90 N. Y. 123, 172.

<sup>2</sup> *Pittsburg v. Brown*, 102 Pa. St. 23.

<sup>3</sup> *Story v. The N. Y. Elevated R. R. Co.*, 90 N. Y. 123, 155; *Barney v. Keokuk*, 94 U. S. 324.

<sup>4</sup> *The Railroad Co. v. Schurmeier*, 7 Wallace, 272; *Story v. The N. Y. Elevated R. R. Co.*, 90 N. Y. 123, 175.

Two views may be taken in this connection, — one, that the public use is paramount, and the private right or privilege so entirely subordinate as to be under the control of the legislature, which may vacate the street altogether, or grant the franchise to a private corporation, to the partial or even entire exclusion of the general public, subject to the duty of acting as common carriers of freight and passengers, and that as such an appropriation takes place by virtue of the sovereign authority of the State and does not divest any private right, it is not an exercise of the power of eminent domain or attended with an obligation to compensate.<sup>1</sup> Agreeably to the other, and, as it would seem, more reasonable view, conceding that the general right to use the street for traffic and as a means of ingress and egress, is derived from the State, and is not, speaking generally, ground for compensation under the law of eminent domain, still the owner of an abutting house or lot is in a different category, because the street is a principal, and may be the only means of access to his property; so that both may be regarded as a whole, and if the street is closed or obstructed the value of the property is gone. There is consequently such a relation between the land on either side and the street, that the owner of the one may justly be regarded as having a right or privilege in the other which cannot be abrogated without compensation.<sup>2</sup>

In the case first cited, a bill was filed by the complainant Schurmeier to enjoin the Railroad Company from taking possession of the land in front of his warehouse; and it was held that, conceding that he had parted with all his title to the ground in question, in dedicating it for public use as a street and landing, still the city could not, nor could the State, empower the respondents to disregard the trust implied in such a transfer, or appropriate the street to a different use that

<sup>1</sup> Philadelphia & Trenton R. R. Case, 6 Whart. 32; Paul v. Carver, 26 Pa. St. 223.

<sup>2</sup> The Railroad Co. v. Schurmeier, 7 Wallace, 272; Story v. The N. Y. Elevated R. R. Co., 90 N. Y. 123, 179; McCombs v. Akron, 15 Ohio, 474; 18 Id. 229; Crawford v. The Village of Delaware, 7 Ohio St. 459, 468.

would render the complainant's premises less valuable and available.

It is immaterial, as regards this principle, whether the street be obstructed or closed altogether; and the injury is still more obvious in the latter case than in the former. Urban highways are not in this regard like rural, because the owner of city property frequently has but one means of access, and when that is vacated, loses all that makes his house or land valuable. If a new highway is substituted, it may be a reason for reducing the damages or withholding them altogether; but the injury actually sustained should be compensated. In *Haynes v. Thomas*<sup>1</sup> it was decided that the right of the owner of a town lot abutting upon a street to use the street, is as much property as the lot itself, and appertains to the lot, and cannot be taken away without compensation. The lot and the adjoining street constitute, as to the owner of the lot, but one piece of property, and an obstruction of the street injures him by impairing the value of his property as a whole. It was decided on like grounds in *Cape Girardeau v. The Bloomfield Road Co.*<sup>2</sup> that the plaintiff below might well object to having the land which he had dedicated as a county road, and might use when he thought proper, handed over to a turnpike company, who would hold it as their own and not suffer him to pass without paying toll.

Both questions—Has an abutting owner a right of property in the street when he does not own the fee? and Is the erection of a structure which, like an elevated railroad, although intended to facilitate transportation, and conducive to that end, renders the buildings on either side less valuable as dwellings and for business, incompatible with the uses for which urban highways are opened or dedicated and ordinarily employed?—arose in the recent case of *Story v. The N. Y. Elevated R. R. Co.*<sup>3</sup> The action was there brought by the owner of a house fronting on a street to restrain the defendant from laying a railway track fifteen feet above the surface, supported by iron columns planted in the sidewalk,

<sup>1</sup> 7 Ind. 38.

<sup>2</sup> 58 Mo. 265.

<sup>3</sup> 90 N. Y. 122.

and extending across the entire width of the carriage-way. The trial court found that the proposed structure would "abridge the sidewalk and interfere with the street as a thoroughfare," and also "obscure the light and impair the usefulness and value of the plaintiff's premises." It also appeared that the street had been laid out by the city, and the land on both sides conveyed by deeds, in which it was described as to remain "forever thereafter for the free and common passage of . . . the inhabitants of the said city and all others passing through the same, in like manner as other streets of the same city are or of right ought to be." The Court of Appeals held that there was an implied contract which it was incumbent on the city to observe, and that the plaintiff had, in common with the owners of the other abutting lots, a right in the nature of an easement which could not be abrogated without compensation. Danforth, J., said, in delivering judgment, that such "is clearly the rule as between individuals, and it does not matter that the acts constituting such dedication are those of a municipality. The State even, under similar circumstances, would be bound; and so it was held in the *City of Oswego v. Oswego Canal Co.*<sup>1</sup> 'In laying out the village plot,' said the court, 'and in selling the building lots, the State acted as the owner and proprietor of the land; and the effect of the survey and sale in reference to the streets laid down on the map, was the same as if the survey and sale had been made by a single individual.' Lesser corporations can claim no other immunity, and all are bound upon the principle that to retract the promise implied by such conduct, and upon which the purchaser acted, would disappoint his just expectations.<sup>2</sup>

"But what is the extent of this easement? What rights or privileges are secured thereby? Generally, it may be said, it is to have the street kept open, so that from it access may be had to the lot, and light and air furnished across the open way. The street occupies the surface, and to its uses the

<sup>1</sup> 6 N. Y. 257.

<sup>2</sup> *Child v. Chappell*, 9 N. Y. 246.

rights of the adjacent lots are subordinate; but above the surface there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner. To hold otherwise would enable the city to derogate from its own grant, and violate the arrangement on the faith of which the lot was purchased. This in effect was an agreement that if the grantee would buy the lot abutting on the street, he might have the use of light and air over the open space designated as a street. In this case it is found by the trial court, in substance, that the structure proposed by the defendant, and intended for the street opposite the plaintiff's premises, would cause an actual diminution of light, depreciate the value of the plaintiff's warehouse, and thus work his injury. In doing this thing the defendant will take his property as much as if it took the tenement itself. Without air and light, it would be of little value. Its profitable management is secured by adjusting it in reference to the right obtained by his grantor over the adjoining property. The elements of light and air are both to be derived from the space over the land, on the surface of which the street is constructed, and which is made servient for that purpose. He therefore has an interest in that land, and when it is sought to close it, or any part of it, above the surface of the street, so that light is in any measure to his injury prevented, that interest is to be taken; and one whose lot, acquired as this was, is directly dependent upon it for a supply, becomes a party interested and entitled, not only to be heard, but to compensation. The easement is property within the meaning of the Constitution and the statutes authorizing the construction of the defendant's road, as well as the warehouse upon the lot, by which it was used and enjoyed, and the owner is, in the language of the Act of 1850 (chap. 140, sections 14, 15, 18), a person having an 'estate or interest in real estate, so that if proceedings were instituted to condemn the street for railroad uses he would, as one of those persons whose estate or interest is to be affected by the proceedings,' be entitled to notice of the same (sect. 14), and compensation (sect. 16)."

The court announced the following conclusions:—

“*First.* That the plaintiff, by force of the grant of the city made to his grantors, has a right or privilege in Front Street, which entitles him to have the same kept open and continued as a public street for the benefit of his abutting property.

“*Second.* That this right or privilege constitutes an easement in the bed of the street which attaches to the abutting property of the plaintiff, and constitutes private property within the meaning of the Constitution, of which he cannot be deprived without compensation.

“*Third.* That such a structure as the court found the defendant was about to erect in Front Street, and which it has since erected, is inconsistent with the use of Front Street as a public street.

“*Fourth.* That the plaintiff's property has been taken and appropriated by the defendant for public use without compensation being made therefor.

“*Fifth.* That the defendant's acts are unlawful; and as the structure is permanent in its character, and if suffered to continue will inflict a permanent and continuing injury upon the plaintiff, he has the right to restrain the erection and continuance of the road by injunction.”

It is established, as the above decision indicates, that the sale of a tract of land in lots or parcels which are described as abutting on a street that has been or is about to be laid out by the vendor, operates as an implied agreement that the street shall be open for the use of the buyers and those claiming under them by descent or purchase.<sup>1</sup>

Sales made by the State or a municipal corporation come within this principle because the public can, no more than an individual, violate an engagement on the faith of which purchases have been made and money expended.<sup>2</sup>

<sup>1</sup> *Schenley v. The Commonwealth*, 36 Pa. St. 62; *Livingston v. The Mayor*, 8 Wend. 85; *Rees v. Chicago*, 38 Ill. 322; *Hills v. Miller*, 3 Paige, 256; *The Trustees v. Cowen*, 4 Id. 510; *Rowan v. Portland*, 8 B. Monroe, 232; 2 *Smith's Leading Cases* (8 Am. ed.), 185, 161.

<sup>2</sup> *City of Oswego v. Oswego Canal Co.*, 6 N. Y. 257; *Story v. N. Y. Elevated R. R. Co.*, 90 N. Y. 122, 145.

"In laying out the village plot," said the court, in the case first cited, "and selling the building lots, the State acted as the owner and proprietor of the land; and the effect of the survey and sale, in reference to the streets laid down on the map, was the same as if the survey and sale had been made by an individual."

Municipal corporations stand on the same footing in this regard as the State, and are equally bound by the principle that such a course of dealing is in effect a covenant which cannot be retracted to the injury of persons who have bought land or erected buildings in the belief that it will be carried into effect.<sup>1</sup>

It follows that when a town is mapped out by one who, like William Penn, at once represents the government and is the owner of the soil, and sold to individuals in parcels which are designated as bounded by the streets marked on the plan, they acquire a right to the highway in front of their premises which is in effect property. The street cannot therefore be closed or appropriated to a different and less beneficial use without compensating the injured parties for the loss.<sup>2</sup>

The case is obviously different when the city does not appear as a vendor, and simply lays out the streets through ground owned by individuals; but it may still be contended that when this is sold in parcels as bounded by the streets, the city becomes in effect a party to the transaction, and cannot disappoint the expectation which it has created by closing the streets or appropriating them to a use which, like a railway or market-place, is at variance with that for which they were originally designed.

The whole argument may perhaps be summed up in the general proposition, that the opening or mapping out by the State or by an individual of land as a street, is a pledge that it shall not be closed or appropriated to a different and less beneficial purpose, which cannot be violated without a breach of faith to subsequent purchasers and builders. We may

<sup>1</sup> *Story v. N. Y. Elevated R. R.*, 90 N. Y. 123.

<sup>2</sup> *Story v. N. Y. Elevated R. R.*, 90 N. Y. 123, 151.

therefore believe that the right of the owner of a shop or dwelling to the use of the adjacent streets, or at all events of that on which the building is situated, is, if not an easement or incorporeal hereditament, an incident or appurtenance without which the building would be valueless, and of which he cannot justly be deprived without compensation,<sup>1</sup> or, as the principle was accurately stated in another case, besides the public right of way or passage there is a private right in the owners of the land on either side, resulting from an implied agreement that the street shall be kept open as a means of transit and for the unobstructed access of light.<sup>2</sup>

It is not easy to define the effect of a legislative closing or vacation of a street, or to say whether it constitutes a taking of the right of way of the abutting owners if such exists. It has been held that such an enactment does not cause a physical obstruction or hindrance, and simply operates as a surrender of the public easement which replaces the parties where they stood before the street was laid out.<sup>3</sup> If this is the effect technically, practically it is very different, by depriving the owners of the abutting land of a means of access which may be essential to its usefulness as a place of abode or business;<sup>4</sup> and it was held on these grounds in *Haynes v. Thomas* to be a taking which gave a right to compensation.

It is not easy to class the right of an abutting owner to a way over the street; but there can be little doubt that it, in common with that of the community, comes under the general head of real estate. For as a nuisance is defined by Blackstone as a hurt or annoyance to lands, tenements, or hereditaments, a man could not recover for the deterioration of his goods through a delay caused by an obstruction of the

<sup>1</sup> *Lackland v. Railroad Co.*, 31 Mo. 180; *Water-works Co. v. Water-works Co.*, 14 Fed. Rep. 194; *Crawford v. Delaware*, 7 Ohio St. 459.

<sup>2</sup> *Story v. N. Y. Elevated R. R.*, 90 N. Y. 146; *Haynes v. Thomas*, 7 Ind. 38; *Protzman v. Railroad Co.*, 9 Id. 467; *Parker v. Framingham*, 8 Metcalf, 260; 2 *Smith's Leading Cases* (8 Am. ed.), 178.

<sup>3</sup> *Paul v. Carver*, 26 Pa. St. 223; *Chicago v. Building Association*, 102 Ill. 379.

<sup>4</sup> *Chicago v. Building Association*, 102 Ill. 379, 397.

highway if the right of passage were not his tenement as well as the public's.<sup>1</sup> But inasmuch as this right is not peculiar to himself, and is shared with the community at large, it wants a distinguishing characteristic of property, and will not sustain a claim for compensation under the law of eminent domain. The case is materially different where the obstruction of the street is of such a nature as to prejudice his occupancy of the adjacent land, and he may then aver a loss of his property in the land, though he had none in the street.<sup>2</sup>

It is not less clear that where there is no private right that can justly be regarded as property, or, what comes to the same thing, where the State has an absolute control or ownership of the subject-matter, any loss that may be incidentally occasioned to individuals is *damnum absque injuria*; and it is immaterial in this regard whether the public title is derived through the right of eminent domain, or in any other way, because the *jus disponendi* incident to ownership does not depend on the mode in which it has been acquired. Such, according to the authorities in Pennsylvania and some of the other States, is the relation of the Commonwealth to the highway, whether it is rural or urban, and whether it was dedicated by the owner or without his consent. The fee may be in him; but he holds it subject to a servitude or easement which has no stint or limit but the sovereign's pleasure, and may be carried to the extent of authorizing the construction of any public way, however diverse or injurious, and although it is exclusive of the general right of passage. The doctrine was laid down broadly by Chief-Justice Gibson in the Philadelphia & Trenton R. R. Co.<sup>3</sup> case as follows: —

“In England a highway is the property of the king as *parens patriæ*, or universal trustee; in Pennsylvania it is the property of the people, not of a particular district, but of the whole State, who, constituting, as they do, the legitimate sovereign, may dispose of it by their representatives and at their pleasure. Highways, therefore, being universally the property of the

<sup>1</sup> Benjamin v. Storr, L.R. 9 C. P. 400, 404, 407.

<sup>2</sup> Beckett v. Midland Railway Co., L. R. 3 C. P. 97.

<sup>3</sup> 6 Wharton 35, 44.

State, are subject to its absolute direction and control. . . . In the construction of her system of improvements, Pennsylvania has acted on this principle. Her dams across her principal rivers to feed her canals have injured if they have not destroyed the descending navigation by the natural channels; and this without suspicion of want of constitutional power. The right of passage by land or water is a franchise which she holds in trust for all her citizens, but over which she holds despotic sway, the remedy for an abuse of it being a change of rulers and a consequent change of the law. No person, natural or corporate, has an exclusive interest in the trust, unless she has granted it to him.

“What then is the interest of an individual inhabitant as a subject of compensation under the constitutional injunction that private property be not taken by a corporation for public use without it? Even agreeing that his ground extends to the middle of the street, the public have a right of way over it. Neither the part used for the street, nor the part occupied by himself, is taken away from him; and as it was dedicated to public use without restriction, he is not within the benefit of the constitutional prohibition, which extends not to matters of mere annoyance. The injury of which he can complain is not direct, but consequential. It consists either in an obstruction of his right of passage, which is personal, or in a depreciation of his property by decreasing the enjoyment of it; but no part of it is taken from him and acquired by the company. The prohibition, even when it precluded a seizure of private property immediately by the State, was not largely interpreted, nor was there reason that it should be, as ample compensation was obtained from her sense of justice without it. . . . But though she usually compensated consequential damage, it was of favor, not of right. Nor did she always make such compensation. In one well-known instance she destroyed a ferry by cutting off access to the shore, without provision for the sufferer; and in the *Commonwealth v. Fisher*<sup>1</sup> damages were unavailingly claimed from her for flooding a spring by a dam. The clause in the amended Constitution, which narrows the former prohibition to a taking of private property for a public

<sup>1</sup> 1 Penn. Rep. 462.

use by a corporation, is to receive the same construction; the word 'taking' being interpreted to mean taking the property altogether, not a consequential injury to it, which is no taking at all. For compensation of the latter, the citizen must depend on the forecast and justice of the legislature."

It is established under this decision that the legislature has in Pennsylvania, subject to the provisions of the new Constitution of that State, absolute control over the highroads, and may deal with them as it thinks proper, without regard to the consequences to individuals, who will have no claim to compensation for the resulting loss unless they can point to some act of assembly conferring a right that would not otherwise exist.<sup>1</sup> The rule applies to urban highways not less than rural, and a railway company may be empowered to run its locomotives at grade through the thoroughfares of a populous city without guarding the track by fences or indemnifying the owners for the depreciation of their property. Compensation was accordingly denied, in *Struthers v. The Dunkirk R. R. Co.*,<sup>2</sup> for the construction of a railway in the public street immediately in front of the plaintiff's dwelling, although he had suffered a real and serious injury from the smoke, noise, and cinders of the trains and locomotives, from the obstruction of the highway, and from the hindrance to the use of the ordinary means of transportation.

It follows from the same principle that as the legislature may vary the uses of a street or highway, so they may vacate it altogether. So considered, such an act takes nothing from the owners of the abutting lots, and on the contrary enlarges their estate by surrendering the public right of way, and replacing them where they stood before the street was opened; and it follows that they are not entitled to compensation for the loss that may be incidentally occasioned by the closing of the street.

A private road is private property, and an act of assembly to vacate it without paying for it, would be depriving the owner of his property. But a public road belongs to nobody but the State; and when the government sees proper to vacate

<sup>1</sup> *Snyder v. Pennsylvania R. R.*, 55 Pa. St. 340.    <sup>2</sup> 87 Pa. St. 282.

it, the consequential loss, if there be any, must be borne by those who suffer just what they would have had to bear from a refusal to open it in the first place.

It is not an argument against the existence of such a power that there is a large amount of property whose chief value would be destroyed by closing the roads that lead to it, or that it might be carried to the extent of vacating the principal avenues of a great town, because this would result in the absurd conclusion that the State could not vacate a useless road and substitute a better one in its place.<sup>1</sup> The injunction which had been asked for to restrain the respondent from building on the ground which had belonged to the grantor under whom he claimed before the opening of the street, was accordingly refused.

Such a conclusion may be just as to rural districts, where the land lies open on every side, but is hardly applicable to urban highways, which have been laid out and paved at the expense of the adjacent land, or as against persons who have purchased or built in the belief that the street would remain open as a means of access. It cannot be said of one thus situated that he is no worse off than if the street had not been opened, and he may, on the contrary, have good reason for averring that he has been misled, and will suffer irreparable injury if it is closed.<sup>2</sup>

If the authority of the legislature is paramount while the highway remains open, and for the purpose of vacating it, they cannot vary the rights of the land-owners as between themselves, and if the latter have expressly or impliedly agreed that a street shall be laid out as an avenue for business, the contract will be binding, although the State declines the dedication or closes the street after it has been accepted. Such, at least, is the doctrine advanced in *Faust v. The Railway Co.*;<sup>3</sup> although it may be doubted whether it is not an implied condition of such a contract that it shall be ratified by the authorities, and whether they do not become

<sup>1</sup> *Paul v. Carver*, 12 Harris, 207, 211.

<sup>2</sup> *Ante*, p. 373.

<sup>3</sup> 3 Phila. 164, 166.

parties to it, and irrevocably bound, by accepting and acting on its terms.

It results from these decisions that the owners of land may be compelled in Pennsylvania to bear the entire cost of the opening and paving of an adjacent street, or a part of their land may be taken for such purposes without payment on the theory that the benefit will equal or exceed the burden, and yet have no right to compensation for the subsequent conversion of the street into a track for trains or locomotives, the pretext being that such a change of use is not a taking;<sup>1</sup> and it will seemingly be immaterial that the complainant has built on the street and has no other means of egress. Such a conclusion is the more inequitable because it is conceded that the jury may, as I have elsewhere stated, in assessing the damages for the appropriation of part of a tract to a public use, consider how it will affect the residue, and make a deduction for the consequential benefit.<sup>2</sup> The effect of the judgment in the Philadelphia & Trenton R. R. Co.'s case accordingly is that the abutting owners have no legal or constitutional right to recover the diminution of value occasioned by laying a railway track on the street, although they received nothing for their land, and compensation would clearly have been due, had the land been taken in the first instance for a railway.

<sup>1</sup> *Harvey v. Railroad Co.*, 47 Pa. St. 428; *Snyder v. Pennsylvania R. R.*, 55 Id. 340, 344.

<sup>2</sup> *Mifflin v. Railroad Co.*, 16 Pa. St. 182; *Plank-Road Co. v. Thomas*, 20 Id. 91; *ante*, pp. 302, 349.

## LECTURE XX.

Eminent Domain (*concluded*). — The Taking by which the Right may be exercised. — Seizure. — Abrogation of the Right of Property. — Forfeiture. — Flooding Land. — Obstructing a Way or Watercourse. — Removing Lateral Support. — The Doctrine that an Assumption as well as a Deprivation of Possession is necessary to constitute a Taking. — Every Direct Interference with the Enjoyment of Property legally occasioned by the Government for the Public Good, a Taking. — The Doctrine of Consequential Damages. — The Liability of an Owner for Injuries resulting from his Use of his own Land the Measure of the State's Duty to compensate for Injuries resulting from its Exercise of the Right of Eminent Domain. — Summary of Cases in which Compensation may be required: 1. Where the Whole of a Lot or Tract is taken; 2. Where Part only is taken; 3. Where Redress is sought for Acts done on Land belonging to other Persons and appropriated by the State to Public Use.

THE answer to the first inquiry — What is property? — is virtually a response to the second — What is the taking that may not occur without compensation? For as property is a right to the entire or partial use, occupation, or enjoyment of some specific thing, it may be taken either by abrogating the right, or so dealing with the thing that the right cannot be beneficially executed or enjoyed. A man's property is taken when his horse is carried away by a trespasser or for the service of the government in time of war; but it is also taken when his goods or chattels are forfeited for felony or treason, as soon as the sentence is pronounced and before the writ is issued to carry it into effect. So land may be taken by acts done in pursuance of an authority conferred by statutes, and rendering it physically unfit for use or habitation,<sup>1</sup>

<sup>1</sup> *Pumpelly v. The Green Bay Co.*, 13 Wallace, 166; *Eaton v. The Railroad Co.*, 51 N. H. 504; *The Transportation Co. v. Chicago*, 99 U. S. 635, 642.

or by a statutory transfer of the title to commissioners with an adequate provision for the assessment of the damages, on the report of a jury of viewers, although its physical condition remains unchanged and it is not entered upon or occupied.<sup>1</sup> If the effect is produced, it matters not by what means; and an act done off the land in question may be as much within the above definition as if the land were occupied. Backing the water of a stream which runs through the complainant's premises, so as to impair its usefulness as a water-power, or flood the land, is consequently a taking, whether the dam or embankment is built on the land or lower down the stream; and so of the diversion of the stream before it reaches the land.<sup>2</sup>

So an act which precludes the exercise of a right over another's land is a taking; as, for instance, if a way or watercourse is obstructed by the owner of the servient lot, or by a railway company under an authority conferred by the government.<sup>3</sup> Property may consequently be taken, according to the common use of language, and within the scope of these decisions, although there is no such entry upon, or occupation of, the soil as would sustain an action of ejectment or assize of novel disseisin.<sup>4</sup>

Cutting down trees or hedges, or excavating sand or gravel, is a taking, and so is the damage caused by digging so near another's line as to cause a caving in or subsidence of the soil from its own weight, and not by reason of a superadded pressure from above.<sup>5</sup> The appropriate remedy in the former instance is trespass, and in the latter an injunction or action on the case; but this does not affect the principle, which depends on the effect produced and not on the means, and is

<sup>1</sup> *Philadelphia v. Dickson*, 38 Pa. 247; *Philadelphia v. Dyer*, 41 Id. 463.

<sup>2</sup> *Pumpelly v. The Green Bay Co.*, 13 Wallace, 166; *Eaton v. B. C. & M. R. R. Co.*, 51 N. H. 504; *Sinnickson v. Johnson*, 2 Harrison, 129.

<sup>3</sup> *Arnold v. The Hudson River R. R. Co.*, 55 N. Y. 661; *Story v. The Elevated R. R. Co.*, 90 Id. 122, 149.

<sup>4</sup> *Stone v. The F. & R. R. Co.*, 68 Ill. 394; *Rigney v. Chicago*, 102 Id. 76.

<sup>5</sup> *Richardson v. The Vermont Central R. R. Co.*, 25 Vt., 465, 471.

equally applicable whether the injury results from acts done on the complainant's land or elsewhere. Such is the rule as between individuals, and the only difference where the act is done under an authority conferred by the State for a public purpose, is that the recovery must be limited to compensation.<sup>1</sup>

It is established, in conformity to these principles, that any physical injury to land by reason of the erection, construction, or operation of a public work, whereby its appropriate use is hindered or its value lessened, is a taking which entitles the owner to compensation to the extent of the loss thereby occasioned, although the injury is consequential and the land not entered upon or occupied.<sup>2</sup>

The obstruction of a street may be as much within this principle, relatively to the owners of the abutting lots, as was the opening;<sup>3</sup> and so, agreeably to the case of *Crawford v. The Village of Delaware*,<sup>4</sup> is a change of an established grade which isolates the complainant's dwelling by leaving it so far above or below the level of the adjacent street as to be virtually inaccessible.

It has nevertheless been held in various instances, and is still the law of Pennsylvania, except in so far as it is modified by the new Constitution of that State, that to constitute a taking there must not only be a deprivation on one side, but an occupation or appropriation on the other; or, to state the principle somewhat differently, that the thing for which the plaintiff seeks compensation must have been appropriated, and not merely rendered less valuable or fit for use. Agreeably to this view, diverting the water of a stream to feed a canal or supply the wants of a town is a taking which entitles the riparian owner to damages; but no such consequence will

<sup>1</sup> *Hatch v. The Central R. R. Co.*, 25 Vt. 49.

<sup>2</sup> *Richardson v. The Vermont Central R. R. Co.*, 25 Vt. 465, 470; *Hatch v. The Vermont Central R. R. Co.*, Id. 49, 69; *Nevins v. Peoria*, 41 Ill. 502; *Rigney v. Chicago*, 102 Id. 64; *The City of Aurora v. Reed*, 57 Id. 29.

<sup>3</sup> *Story v. The New York Elevated R. R. Co.*, 90 N. Y. 91, 123.

<sup>4</sup> 7 Ohio St. 459.

follow when the diversion is caused by a railroad embankment or cutting, because the water is appropriated in the former case to the use of the defendant, while in the latter it is simply lost to the owner.<sup>1</sup>

It was decided in *The Monongahela Navigation Co. v. Coons*,<sup>2</sup> in accordance with this view, that backing the water of a stream on the plaintiff's mill by the erection of a dam did not entitle him to compensation, because nothing was taken, and he was simply prevented from using what was his own; and the court took the following grounds in delivering judgment.

*First.* That to constitute a taking, in the sense of the Constitution as then existing, there must be "an assumption of possession," as distinguished from a "deprivation." Flooding a man's land is not such a taking, nor is it the "deprivation" which the Constitution forbids "save by the judgment of his peers or the law of the land." Though such an act was indeed originally considered so far a species of ouster that the owner "might have had a remedy for it by an assize of novel disseisin or assize of nuisance at his election," it could not be supposed "that the framers of the Constitution meant to entangle their meaning in the mazes of the *jus antiquum*. . . . Words which do not of themselves denote that they are sued in a technical sense, are to have their plain, popular, obvious, and natural meaning; and applying this rule to the context of the Constitution . . . the State is not bound beyond her will to pay for property which she has not taken to herself for the public use."

*Second.* Where the charter of incorporation does not give compensation for such injuries, the legislature cannot provide a remedy subsequently, and thus burden the company with charges not originally imposed. The court cited and relied on *The Philadelphia & Trenton Railroad* case as establishing that laying a railway track on a public street is not a taking, whether the fee is in the city or remains in the party who

<sup>1</sup> See *Lycoming Gas & Water Co. v. Moyer*, 99 Pa. 615, 620.

<sup>2</sup> 6 W. & S. 101; s. c. 6 Pa. 379.

sues for compensation. A like judgment was rendered in *McKeen v. The Canal Co.*;<sup>1</sup> and flooding the land of a riparian owner by a dam built lower down the stream for the improvement of the navigation, was declared a merely consequential injury for which he was not entitled to damages. It was decided in like manner in the *West Branch Canal Co. v. Mulliner*<sup>2</sup> that the defendants below were not answerable for raising the water in their canal to a height which forced it into the complainant's cellar and seriously injured the walls of his house, because the injury was consequential, and there was no negligence or actual taking.

Compensation can no more be provided, under the view taken in Pennsylvania, for such injuries as against pre-existing companies by an amendment of the Constitution than by an act of assembly, because the effect is to burden the company with a new liability contrary to the charter; and the people are as much bound by the prohibition of laws impairing the obligation of contracts as the legislature.<sup>3</sup>

There would be more color for this doctrine if the duty of compensation rested solely on the Constitution, and it might be contended that the courts cannot enlarge the bounds even of a remedial statute; but we have seen that the right to appropriate private property and the obligation to indemnify the owner are correlatives, and spring from the same stock, — the duty of government to care for each several part, as well as the whole, and never to sacrifice the individual to the community without some plain and overwhelming necessity, and then not without indemnifying him for the loss. If constitutional guaranties may not be enlarged, they should not be interpreted in a restrictive sense; and the right of eminent domain should consequently stand under our system as it would stand were the Constitution silent, — under the general public law; namely, attended with the duty of compensation for every loss occasioned to an individual by an act done for the general good, and that exceeds the bounds within

<sup>1</sup> 49 Pa. 439.

<sup>2</sup> 68 Pa. 357.

<sup>3</sup> *The Pennsylvania R. R. Co. v. Duncan*, 111 Pa. 352, 364.

which the government may, equally with a private owner, use what belongs to it, regardless of the effect on others.<sup>1</sup>

The main course of decision accordingly is, that if the beneficial use and enjoyment of property are prevented by acts done under an authority conferred by law, the property is as effectually taken as though the title were condemned.<sup>2</sup>

In *Sinnickson v. Johnson*,<sup>3</sup> the defendant had been authorized by an act of the legislature to improve the navigation of Salem Creek by the erection of a dam across the channel. There was no allegation of negligence; but the dam caused the water to overflow the plaintiff's land, and it was held that as the act would manifestly have been tortious but for the right of eminent domain, so it could not be done under or by virtue of that right without the compensation which was a necessary condition of its exercise.

The question arose in *Pumpelly v. The Green Bay Co.*,<sup>4</sup> under a declaration that the water of a lake had been so raised by a dike, built by virtue of an act of assembly, as permanently to overflow the plaintiff's land; and it was contended for the defence that there was no taking within the meaning of the constitutional provision, and there could be no liability for the consequential results of a work constructed under an authority given by the government, in pursuance of its undoubted right to take such steps as it deemed requisite for the improvement of a navigable stream. Miller, J., said, in giving judgment for the plaintiff, that "it would be a very curious and unsatisfactory result if, in construing a provision of constitutional law always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators, as placing the just principles of the common law on that subject beyond the power of ordinary legis-

<sup>1</sup> *Gardner v. Newburgh*, 2 Johnson's Ch. 162; *Sinnickson v. Johnson*, 2 Harrison, 129; *Pumpelly v. The Green Bay Co.*, 13 Wallace, 166.

<sup>2</sup> *Bridge Co. v. The United States*, 105 U. S. 502.

<sup>3</sup> 2 Harrison (N. J.), 129.

<sup>4</sup> 13 Wallace, 166.

lation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction, without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen as those rights stood at the common law, instead of the government, and make it an authority for the invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

Numerous instances were cited in *Sinnickson v. Johnson*<sup>1</sup> for the proposition that compensation is an inseparable incident to the exercise of the right of eminent domain; and that case was directly in point as showing that overflowing land by backing the water on it is a "taking" within the meaning of the principle. "In the case of *Gardner v. Newburgh*,<sup>2</sup> Chancellor Kent granted an injunction to prevent the trustees of Newburgh from diverting the water of a certain stream flowing over the plaintiff's land from its usual course, because the act of the legislature which authorized it made no provision for compensating the plaintiff for the injury thus done to his land. And he did this though there was no provision in the Constitution of New York such as we have mentioned, and though he recognized that the water was taken for a public use. After citing several Continental jurists on this right of eminent domain, he says that while they admit that private property may be taken for public use when public necessity or utility requires, they all lay it down as a clear principle of natural equity that the individual whose property is thus sacrificed must be indemnified. And he adds that the principles and practice of the English government are equally explicit on this point. It will be seen in this case that it was the diversion of the water from the plaintiff's land which was considered as taking private property

<sup>1</sup> 2 Harrison (N. J.), 129.

<sup>2</sup> 2 Johnson's Ch. 162.

for public use, but which, under the argument of the defendant's counsel, would, like overflowing the land, be called only a consequential injury. If these be correct statements of the limitations upon the exercise of the right of eminent domain, as the doctrine was understood before it had the benefit of constitutional sanction, by the construction now sought to be placed upon the Constitution, it would become an instrument of oppression rather than protection to individual rights. But there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. Angell, in his work on Watercourses, equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken.<sup>1</sup>

"We are not unaware of the numerous cases in the State courts in which the doctrine has been successfully invoked, that for a consequential injury to the property of the individual arising from the prosecution of improvements of roads, streets, rivers, and other highways for the public good, there is no redress, and we do not deny that the principle is a sound one in its proper application to many injuries to property so originating. And when in the exercise of our duties here we shall be called upon to construe other State constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those States. But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and in some cases beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed upon it, so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the Constitution, and that this propo-

<sup>1</sup> Angell on Watercourses, 465 ; *Hooker v. New Haven & Northampton Co.*, 14 Conn. 146 ; *Rowe v. Granite Bridge Co.*, 21 Pickering, 344 ; *Canal Appraisers v. The People*, 17 Wend. 571 ; *Lackland v. North Missouri R. R. Co.*, 31 Mo. 180 ; *Stevens v. Proprietors of Middlesex Canal*, 12 Mass. 466.

sition is not in conflict with the weight of judicial authority in the country, and certainly not with sound principles. Beyond this we do not go, and this case calls us to go no farther." This judgment was cited in *The Bridge Co. v. The United States*,<sup>1</sup> as disentangling the constitutional provision from the refinements by which it had been unduly narrowed, and placing it on a basis which was just alike to the State and the citizen.

It is not essential to the application of this principle that the land should be continuously flooded; and turning a stream of water on a field may be a taking, although the surface is not entirely or permanently submerged.<sup>2</sup>

In the case last cited, a canal and waste weir were constructed under an authority from the State, and the surplus water of the weir allowed to escape through a sluice or flood-gate. It flowed over the adjacent farms, and the owner of them brought an action on the case against the commissioners. It was contended for the defendants that as the weir had been constructed in pursuance of an authority legitimately conferred by the legislature, and there was no allegation of negligence, they were not responsible for a result which no care on their part could avert. The court was nevertheless of opinion, in accordance with the view taken in *Gardner v. Newburgh*<sup>3</sup> that while the legislature unquestionably had the power in question, it was on condition of indemnifying the persons whose property was injuriously affected by its exercise, and that the taking was not less real because it was consequential and the defendants did not occupy the land.

Whether the plaintiff's premises are flooded by the wrongful diversion of a stream, or scorched with the fire emitted by a locomotive, the loss may be the same, and there is no difference in point of principle;<sup>4</sup> and in *Stone v. The Railroad Co.*,

<sup>1</sup> 105 U. S. 502.

<sup>2</sup> *Toledo R. R. Co. v. Morrison*, 71 Ill. 616; *Hooker v. The New Haven & Northampton Co.*, 14 Conn. 146.

<sup>3</sup> 2 Johnson's Ch. 162.

<sup>4</sup> *Rigney v. Chicago*, 102 Ill. 65; *Stone v. The Railroad Co.*, 68 Id. 394.

a declaration charging the defendants with casting cinders, sparks, and smoke from their engines on the plaintiff's dwelling, and thereby greatly damaging the same, was held to show a taking which entitled him to damages.

It may be observed, in this connection, that a damage from the use of fire on one's own land to the property of another, is not a cause of action, agreeably to the American decisions, save on the ground of negligence, or where the circumstances are such as to constitute a nuisance, which should appear in the pleadings and not be left to inference.<sup>1</sup> Such is the rule as regards the use of fire in manufactories and for household purposes; and it should seemingly apply in favor of railroad companies.

It has been decided, in like manner, that a recovery may be had for the flooding of land, although it is intermittent and only occurs during freshets, if the result is one which the obstruction is calculated to produce, and which will presumably recur.

In *Eaton v. The B. C. & M. R. R. Co.*<sup>2</sup> the action was brought to recover damages for the act of the defendants in cutting through a ridge some distance to the north of the plaintiff's farm, and thereby letting in an adjacent river in times of flood. The court held that to turn a stream of water on to the plaintiff's premises was as marked an infringement of his proprietary rights as it would have been if the defendants had gone on the premises in person and dug a ditch or deposited a mound of earth. It mattered not that the flooding did not occur unless there was a freshet. A right of occasional flooding was as much an easement as a right of permanent submersion. What difference was there, in point of principle, whether the plaintiff's land was incumbered with stones or with iron rails, whether the defendants ran a locomotive over it or flooded it with the waters of Baker River?<sup>3</sup>

<sup>1</sup> *Clark v. Foot*, 8 Johns. 421.

<sup>2</sup> 51 N. H. 504, 514.

<sup>3</sup> *The Canal Co. v. The People*, 5 Wend. 423, 452; *Nevins v. The City of Peoria*, 41 Ill. 502; *Pettigrew v. Evansville*, 25 Wis. 223.

In *The Evansville R. R. Co. v. Dick*,<sup>1</sup> the plaintiff owned a farm on the banks of White River, below the place where the defendant's railroad crossed that stream; and it appeared in evidence that the defendants had, in constructing the road, built an embankment across a lateral channel opposite the plaintiff's land, through which the river usually ran in times of flood. The effect was greatly to increase the force and volume of the current at its higher stages, and force the water over the plaintiff's premises, to the irreparable injury of his crops. The court held that although the charter did not give compensation for such injuries, or point out the mode in which it could be obtained, this did not vary the plaintiff's constitutional right or preclude him from enforcing it by suit. Davison, J., said, "The Constitution (Article I., section 21) provides, 'No man's property shall be taken by law without just compensation.' As we are advised, a proper construction of the word 'taken' makes it synonymous with seized, injured, destroyed, deprived of. It is therefore evident that the legislature have no power to authorize in any case either a direct or consequential injury to private property without compensation to the owner. If then such a grant, when expressly made, would be in conflict with the Constitution, we are not allowed to infer that such an authority was intended to be granted, from the mere fact that a railroad was authorized. It seems to follow that the defendants, having voluntarily and for their own profit so constructed their road as necessarily to injure the plaintiff, and there being no remedy given by their charter, are liable in the present action. *Hooker v. The New Haven & Northampton Co.*<sup>2</sup> goes the full length of this case. There the act complained of was a lawful act. It was done with prudence and care, and the injury to the plaintiff was consequential. Still the company was held answerable in damages for the resulting loss."

The doctrine that the obstruction of a right to real or personal estate may be equivalent to a taking, is nevertheless subject to a qualification. Property, legally and in common

<sup>1</sup> 9 Ind. 433.

<sup>2</sup> 14 Conn. 153.

parlance, is not an abstraction, but a right in, to, or over something which from its nature admits of ownership; and to constitute a "taking" there must consequently be an abrogation of the right or a physical injury to the thing which impairs its beneficial use and enjoyment. Threatening a man with death if he enters on his land is not a "taking," although he is thereby as effectually prevented from using the land as if it were occupied and held adversely. When, therefore, there has been no legal appropriation of land or divestiture of the title, the owner will not be entitled to compensation for acts done on other land unless they would afford ground for trespass *quare clausum fregit*, or an action on the case for a nuisance if the question arose between individuals at common law.<sup>1</sup> Cutting off the only means of access to A's land by the construction of a canal or railroad on B's, is not therefore a "taking" unless A has a right of way, and then only of his property in B's land, and not of his own. It is on this ground that the right to compensation for the conversion of a street into a railroad track is held in many of the States to depend on whether the city has the fee or merely a right of passage, because although the owners of the abutting lots are equally deprived of the means of access in either case, the entire physical alteration is in the street, and there can be no taking unless they have some right or title to it which the law can recognize.

The distinction is exemplified by the case of *Slatten v. The Des Moines R. R. Co.*,<sup>2</sup> where compensation was denied for the erection of an embankment in front of the plaintiff's hotel, which not only darkened the windows and shut out his customers, but rendered the building useless for business purposes. Had the soil of the street belonged to him, the result would have been different; but as this was owned by the city, he had no property in it, and the incidental depreciation of the abutting land was not a taking within the meaning of the Constitution or in the sense in which the word is ordinarily employed. Hard as such a conclusion may seem, it is yet irrefragable if it be conceded that the

<sup>1</sup> *Rigney v. Chicago*, 102 Ill. 64, 76.

<sup>2</sup> 29 Iowa, 148.

right to compensation depends wholly on the Constitution, and that there can be no private right in a street without a title to the soil.

The doctrine has, as we have seen, been carried in numerous instances to the extent of holding that where the complainant is not dispossessed, and the loss results from the appropriation of the adjacent land to a purpose by which he is injuriously affected, there is no constitutional or legal right to compensation, and the legislature may give or withhold it as they see proper. Such losses are, agreeably to this view, *damnum absque injuria*, and must be borne as incident to existence in an organized community, which in acting for the good of all may find itself compelled to adopt measures that are disadvantageous to individuals.<sup>1</sup>

These decisions rest on the twofold assumption that the right to be indemnified for injuries resulting from the exercise of the power of eminent domain depends solely on the constitutional provision that property shall not be taken for public use without compensation, and that these words must be literally construed, and do not apply where the complainant is injured without being dispossessed.<sup>2</sup> In the case last cited, which may be regarded as typical, a street was cut down to a lower grade or level, and the complainant's church left isolated on a height where it could not be conveniently reached, and the foundations would in all probability give way from the want of lateral support; and it was in evidence that the evil could not be remedied without costing more than the property was worth. The loss was therefore total;

<sup>1</sup> *Lansing v. Smith*, 8 Cowen, 146; *West Branch Canal Co. v. Mulliner*, 68 Pa. 360; *Monongahela Nav. Co. v. Coons*, 6 W. & S. 101; s. c. 6 Pa. 379, 382; *P. & A. Bridge Co. v. Henry*, 8 W. & S. 85; *Freeland v. Penn. R. R. Co.*, 66 Pa. 91; *Susquehanna Canal Co. v. Wright*, 9 W. & S. 9; *McKinney v. Monongahela Nav. Co.*, 14 Pa. 65; *Wilson v. The Mayor of New York*, 1 Denio, 595; *Skinner v. The Hartford Canal Co.*, 29 Conn. 523; *Sprague v. Worcester*, 13 Gray, 193; *Rundle v. The Delaware & Raritan Canal Co.*, 14 Howard, 80; *Gossler v. Georgetown*, 6 Wheat. 703.

<sup>2</sup> *West Branch Canal Co. v. Mulliner*, 68 Pa. 360; *Monongahela Nav. Co. v. Coons*, *supra*; *Philadelphia & Trenton R. R. Co.*, 6 Wharton, 25, 45; *O'Connor v. Pittsburgh*, 18 Pa. 87; 6 W. & S. 101; s. c. 6 Pa. 379.

but the court held that the city was entitled to judgment, because the damages were consequential, and there was no taking. Gibson, C. - J., said that the State could not be sued against her will, and that her prerogative in this regard would be unavailing if it did not protect the agents whom she employed while acting within the scope of the authority which she had constitutionally conferred.

In the above-cited cases compensation was denied on the ground that the injury was merely consequential, and arose, not from the taking of the complainant's land, but from the manner in which land taken from others, or forming part of the public domain, was employed; and we are thus confronted with the inquiry, What is the liability of the State for the use made of land acquired by virtue of the right of eminent domain? or, to put the case somewhat differently, does the right of eminent domain extend beyond taking property with compensation to the owner, to using it in a way to be injurious to third persons without indemnifying them, although the circumstances are such that compensation would be due if the question arose between individuals? The right to take and the right to use, though sometimes confounded, are obviously not identical, and must be considered severally, in order to arrive at a correct result.

In considering such questions it must be remembered, as I have elsewhere stated, that the provision that property shall not be taken for public use without compensation is not the only one that protects the citizen from spoliation. There is another,—that no one shall be deprived of life, liberty, or property unless by the judgment of his peers or the law of the land. It will not be contended that a law taking private property for a public need without compensation, or injuring it to an extent that amounts to a deprivation, is the law of the land here spoken of; and both clauses must consequently be regarded as tending to the same end, though one is specific, and the other general.<sup>1</sup>

<sup>1</sup> The *Barclay R. R. Co. v. Ingham*, 36 Pa. 194; *Taylor v. Porter*, 4 Hill, 140; *Embury v. Connor*, 3 N. Y. 511, 517; *Palairé's Appeal*, 67 Pa. 479, 485.

What the State may justly claim by virtue of the right of eminent domain as thus regulated, consequently, is to buy without the consent of the vendor, and not to use in a way that would be injurious had the land been obtained by other means. But it is not less true that what comes to her by purchase, like that which is inherently her own, may be dealt with as she thinks proper, subject to the rule *sic utere tuo ut alienum non laedas*, which does not ordinarily cover consequential damages.

An incorporated or unincorporated company obviously have as much right to lay out a railway track and use locomotives as they have to erect factories and propel the machinery by steam; and the right of recovery for the resulting smoke, sparks, and noise depends in either event on general principles, and not on how they became the owners of the land.

This doctrine has sometimes been treated as peculiar to the law of eminent domain, but may seemingly, so far as it is sound, be referred to a different head. Every one is ordinarily entitled to do what he will with his own, without being answerable for the loss thereby occasioned to others, unless there is not merely damage,<sup>1</sup> or, in other words, loss from an invasion of right, but a *damnum injuriosum*;<sup>2</sup> and there is no reason why the Commonwealth should be denied the benefit of this rule. Whatever an individual may do by virtue of the ownership of real or personal estate without being answerable for the consequences, may therefore be done by the State, aside from its prerogative, with an equal freedom from responsibility.<sup>3</sup>

The bare fact, therefore, that the public domain, whether of long standing or recently acquired, is so used as to render the adjacent land less habitable or valuable, gives the sufferers

<sup>1</sup> *Acton v. Blundell*, 12 M. & W. 324, 341; *Runnells v. Bullen*, 2 N. H. 532, 535; 2 L. C. in Eq. (4 Am. ed.) 264; *Broom's Legal Maxims*, 161.

<sup>2</sup> *Smith v. Kendrick*, 7 C. B. 575; 12 Ohio St. 294; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126.

<sup>3</sup> *Hatch v. The Vermont Central R. R.*, 25 Vt. 49, 63; *The Railroad Co. v. Yeiser*, 8 Pa. St. 366, 374; *Radcliff's Ex'rs v. Brooklyn*, 4 Comstock, 200; *post*, p. 422.

no more right to compensation than they would have if a like course were pursued by a private person.

In *Radcliff's Executors v. The Mayor, etc., of Brooklyn*,<sup>1</sup> Bronson, C.-J., said: "Let us now see what a man may do in the enjoyment of his own property without being answerable to others for consequential damages, — always assuming that he acts with proper care and skill. He may set fire to his fallow ground, and though the fire run into and burn the wood-land of his neighbor, no action will lie.<sup>2</sup> He may open and work a coal-mine in his own land, though it injure the house which another has built at the extremity of his land.<sup>3</sup> And he may do the same thing, though it cut off an underground stream of water which before supplied his neighbor's well, and leave the well dry.<sup>4</sup> He may build on his own land though it stops the lights of his neighbor,<sup>5</sup> and even though he build for the very purpose of stopping the lights.<sup>6</sup> He may pull down his own house, though the adjoining house fall for the want of the support which it before had; and he may do it without shoring up the adjoining house, — that being the business of the owner.<sup>7</sup> He may pull down his own wall, though the vaults of his neighbor be thereby destroyed.<sup>8</sup> He may build a house and make cellars upon his soil, whereby a house on the adjoining soil falls down.<sup>9</sup> He may dig in his own land, though the house which his neighbor has previously erected at the extremity of his land be thereby undermined and fall into the pit.<sup>10</sup> In *Panton v. Holland*,<sup>11</sup> the defendant, for the purpose of laying the foundation of a house in his own land, dug some distance below

<sup>1</sup> 4 N. Y. 195.

<sup>2</sup> *Clarke v. Foot*, 8 John. 421.

<sup>3</sup> *Partridge v. Scott*, 3 M. & W. 220.

<sup>4</sup> *Acton v. Blundell*, 12 M. & W. 324.

<sup>5</sup> *Parker v. Foot*, 19 Wend. 309.

<sup>6</sup> *Mahan v. Brown*, 13 Wend. 261.

<sup>7</sup> *Peyton v. Mayor and Commonalty of London*, 9 B. & C. 725.

<sup>8</sup> *Chadwick v. Trower*, 6 Bing. N. C. 1.

<sup>9</sup> Com. Dig. Action on the Case for Nuisance, C.

<sup>10</sup> 2 Rolle's Ab. Trespass I. pl. 1; *Wyatt v. Harrison*, 3 B. & Ad. 871.

<sup>11</sup> 17 Johns. 92.

the foundation of the plaintiff's house in the contiguous lot, whereby the walls of the plaintiff's house were cracked, and the house was otherwise injured; and it was held that no action would lie. In *Lasala v. Holbrook*,<sup>1</sup> the plaintiffs were the owners of a church, built within six feet of the line of their lot, and the defendant, for the purpose of building in his adjoining lot, was sinking the foundation for his building sixteen feet below the natural surface of the ground, and ten feet below the foundation of the church, whereby the foundation of the church was greatly endangered; and yet an injunction to restrain the excavation, which had been granted by a master, was dissolved by the chancellor on the ground that the defendant was exercising a lawful right. In *Thurstons v. Hancock*<sup>2</sup> the plaintiff had built a valuable house on Beacon Hill, in the city of Boston, one side of the house being within two feet of the side of his land, and had taken the precaution to sink his foundation fifteen feet below the ancient surface of the ground. Seven years afterwards the defendant commenced digging and carrying away the earth from his adjoining land, and dug to the depth of from thirty to forty-five feet below the natural surface of the ground; by reason of which the foundation of the plaintiff's house was rendered insecure, and he was obliged to take the house down. And yet it was held that no action lay for the injury to the house."

It was decided on like grounds in *The Pennsylvania Coal Co. v. Sanderson*,<sup>3</sup> after much fluctuation of opinion, by a divided court, that an owner or operator may drain or pump the water which percolates through his mine into a stream which forms the natural drainage of the basin in which the mine is situated, although the effect is to increase the volume of the stream and so affect its quality as to render it totally unfit for domestic use by the lower riparian owners. "It may," said Clark J.,<sup>4</sup> "be stated as a general proposition that every man has the right to the natural use and enjoyment of his own property; and if whilst lawfully in such use

<sup>1</sup> 4 Paige, 169.      <sup>3</sup> 86 Pa. 401; 94 Id. 302; 102 Id. 307; 113 Id. 126.

<sup>2</sup> 12 Mass. 220.      <sup>4</sup> 86 Pa. 401; 94 Id. 302; 102 Id. 307.

and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*, for the rightful use of one's own land may cause damage to another without any legal wrong. Mining in the ordinary and usual form is the natural user of coal lands; they are for the most part unfit for any other use. 'It is established,' says Cotton, L.-J., in *West Cumberland Iron Co. v. Kenyon*,<sup>1</sup> 'that taking out mineral is a natural use of mining property, and that no adjoining proprietor can complain of the result of careful, proper mining operations.' In the same case Brett, L.-J., says: 'These cases have decided that where the maxim (*sic utere tuo ut alienum non lædas*) is applied to landed property, it is subject to a certain modification, it being necessary for the plaintiff to show not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land.'''

How broad the charter is, may be gathered from the above decisions;<sup>2</sup> and if we follow the analogy, it will be found to cover a large number of the cases that have been decided on more questionable grounds. As fire may be used for household purposes, or in a manufactory, or by a farmer to burn brush or weeds, without being answerable for its spreading to an adjacent building or woodland,<sup>3</sup> so no greater liability will attach for the sparks issuing from the furnace of a locomotive, whether it is run by an individual on his own land, or by a company chartered by the legislature and on land acquired under the right of eminent domain. A man may excavate his own land, although the effect is to cause his neighbor's dwelling to fall into the opening,<sup>4</sup> unless the effect is due to the disturbance of the natural equipoise of the strata, and would

<sup>1</sup> 11 L. R. 6 Ch. Div. 773.

<sup>2</sup> 4 N. Y. 195.

<sup>3</sup> *Clark v. Foot*, 8 Johns. 421; *The Railroad Co. v. Yeiser*, 8 Pa. 366, 374.

<sup>4</sup> *Partridge v. Scott*, 3 M. & W. 220; *Wyatt v. Harrison*, 3 B. & Ad. 871; *Panton v. Holland*, 17 Johns. 92; *Lasala v. Holbrook*, 4 Paige, 169; *Thurston v. Hancock*, 12 Mass. 226.

have ensued though there were no artificial load or pressure;<sup>1</sup> and such also is the rule as to excavations made by a city in land belonging to the public, or acquired under the right of eminent domain.<sup>2</sup> So a municipal corporation may change the grade of a street as rightfully as can a private owner that of his garden,<sup>3</sup> unless it has been established by a law or ordinance which cannot be repealed without a breach of faith to the persons who have built in reliance on the assurance which it held forth.<sup>4</sup> So navigable rivers are exclusively subject to the State, which will incur no greater responsibility for any loss that may incidentally ensue from the erection of a bridge or dam, or the deepening of one channel at the expense of another, than would attach to an individual who adopted a similar course with regard to a brook flowing through his farm.<sup>5</sup> The water may not be raised to a level that will submerge the adjacent land, but there will, according to the decisions in Pennsylvania, be no obligation to make good losses occasioned in times of flood by the obstruction of the channel, and consequent retardation of the current.<sup>6</sup>

In like manner, as I have already indicated, the legislature or a municipal corporation may authorize a necessary excavation in a street or change its grade without being answerable to a neighboring proprietor, who is thereby deprived of light

<sup>1</sup> *Ashby v. White*, 1 Smith's Leading Cases (8 Am. ed.), 500.

<sup>2</sup> *Richardson v. The Vermont Central R. R. Co.*, 25 Vt. 471; *Hatch v. The Vermont Central R. R.*, 25 Id. 73.

<sup>3</sup> *Radcliff v. Brooklyn*, 4 N. Y. 195.

<sup>4</sup> *Crawford v. The Village of Delaware*, 7 Ohio St. 468; *Keasy v. Louisville*, 4 Dana, 154; *The City of Louisville v. The Mill*, 3 Bush, 416; *Goszler v. Georgetown*, 6 Wheaton, 593.

<sup>5</sup> *Pennsylvania v. The Wheeling Bridge Co.*, 18 Howard, 421, 431; *New York & Erie R. R. Co. v. Young*, 33 Pa. 175; *Barclay P. R. Co. v. Ingham*, 36 Id. 91; *Hooker v. New Haven & Northampton Co.*, 14 Conn. 146; s. c. 15 Id. 312; *Wabash & Erie Canal v. Spears*, 16 Ind. 440.

<sup>6</sup> *The Lehigh Bridge Co. v. The Lehigh Coal & Navigation Co.*, 4 Rawle, 9; *The Monongahela Navigation Co. v. Coons*, 6 W. & S. 101; s. c. 6 Pa. 379, 383; *McKeen v. The Delaware Div. Canal Co.*, 49 Id. 424; *Freeland v. The Pennsylvania R. R. Co.*, 66 Id. 91; *Sprague v. Worcester*, 13 Gray, 193.

and air,<sup>1</sup> or whose dwelling is injured or overthrown through the subsidence of the soil occasioned by the loss of lateral support. This does not flow from the right of eminent domain, and would be equally true of a similar act done by virtue of a merely private right. The complainant may be exposed to much loss and inconvenience, and his property rendered undesirable as a habitation or for trade; but he would not have been entitled to compensation had such a change been made by an adjacent owner,<sup>2</sup> and he has no higher claim against the State.

So damages cannot be recovered against a railroad company, in the absence of negligence, for a fire occasioned by the sparks ejected from the funnels of its engines, not because the loss is consequential, but because there is no responsibility for the injuries that may incidentally ensue from the careful exercise of a legal right.<sup>3</sup>

On the other hand, justice would seem to require that if the State stands relatively to land taken for public use in the position of an owner, and may do all that ownership will authorize, she should not rely on the right of eminent domain as an excuse for any use that would be a nuisance at common law, save on the terms of compensating the party whose interest is subordinated to the public good.<sup>4</sup> Hence, while compensation is not due by the Commonwealth for injuries for which an individual would not be answerable if they resulted from acts done on his own land, the converse should also be true, that the State or a corporation acting by virtue of her authority, may not adopt any course that would be actionable between man and man; as, for instance, by vitiating the air with offensive gases or odors, disturbing the quiet of the

<sup>1</sup> *Green v. Reading*, 9 Watts, 382; *O'Connor v. Pittsburg*, 18 Pa. 187; *In re Ridge St.*, 29 Id. 391, 395; *Wilson v. The Mayor of New York*, 1 Denio, 595; *Hatch v. The Vermont Central R. R. Co.*, 25 Vt. 73; *Richardson v. The Vermont Central R. R.*, 2 Id. 473.

<sup>2</sup> *Hatch v. The Vermont Central R. R. Co.*, 25 Vt. 61, 63; *Richardson v. The Vermont Central R. R. Co.*, Id. 471.

<sup>3</sup> *The Railroad Co. v. Yeiser*, 8 Pa. 367.

<sup>4</sup> *Hatch v. The Vermont Central R. R. Co.*, 25 Vt. 49, 69; *Richardson v. The Vermont Central R. R. Co.*, Id. 471; *post*, p. 422.

neighborhood with sounds that hinder sleep, closing streets that have been laid out as public highways, or, what comes to the same thing, appropriating them to uses which are inconsistent with their beneficial enjoyment as streets, and then deny compensation on the ground that the damage is consequential, and there is no actual taking.<sup>1</sup>

True, there can be no recovery for acts done under an authority conferred by the law; but agreeably to the doctrine of Magna Charta, as constitutionally established in the United States, a law which impairs private rights is invalid, and cannot be relied on as a justification. If, as will generally be conceded, a State or the General Government could not lawfully flood the land of a citizen by erecting a dam on ground which it held as part of its public domain, it cannot do so by virtue of its eminent domain without the compensation which is essential to the exercise of that right. But for this principle, a tract containing many thousand acres might be submerged by turning the course of a river or letting in the waters of the sea, as is proposed by the French engineers in Africa, and the sufferers denied compensation on the pretext that the work was done on other land, and theirs not taken. Such an inundation might differ in extent, but would not be more objectionable in principle, than the acts which have been sanctioned by the authorities in Pennsylvania.

The point at which acts that are legal in, themselves may become wrongful by reason of their consequences, and ownership cannot be pleaded as a justification for damage, is nevertheless ill defined, both as it regards persons acting under an authority from the State, and private owners. It has been held in the United States, contrary to the rule which seems to have prevailed in England until it was modified by Parliament,<sup>2</sup> that a man may, in the absence of negligence, use fire

<sup>1</sup> The Barclay P. R. Co. v. Ingham, 36 Pa. 194; Crawford v. The Village of Delaware, 7 Ohio St. 459; Hooker v. New Haven & Northampton Co., 15 Conn. 312; Evansville R. R. Co. v. Dock, 9 Ind. 433.

<sup>2</sup> Stat. 31 Anne, c. 6; 14 George III. c. 78; Filliter v. Phippard, 11 Ad. & El. 346.

to warm his dwelling, or even to clear his ground, without being answerable for its spreading to his neighbor's house or woodland;<sup>1</sup> and there would seem to be no sufficient reason why the use of fire to drive a stationary engine, or one employed as a motive power on a railway, should be less favorably considered.<sup>2</sup> It was accordingly declared in the *Railroad Co. v. Yeiser* that an action will not lie for a reasonable use of property, although to the injury of another, unless on proof of negligence, and that locomotives are not an exception to the rule. So it was decided in *Livingston v. Rider*<sup>3</sup> that when one builds a dam upon a proper model, and the work is well and substantially done, he is not liable to an action though it break away, in consequence of which his neighbor's mill and dam are destroyed. For like reasons a recovery cannot be had against a railway company for the destruction of the plaintiff's woods or buildings by the sparks emitted by the funnels of their engines, if it appears that they used all due diligence and the best appliances to guard against such consequences and prevent the emission of incandescent particles.<sup>4</sup>

These cases do not necessarily rest on the ground that an action will not lie for an injury inflicted under an authority conferred by the legislature, — although that was relied on in some of them, — but on the general principle that acts which are legitimate, and not necessarily injurious, and which are done with every precaution that the nature of the case admits, are not actionable, although they incidentally result in injury. But the public privilege in this regard, as in that of an excavation, does not extend beyond that of an individual, and cannot be pleaded as a justification for any damage which might have been avoided with due care. A recovery may therefore

<sup>1</sup> *Clark v. Foot*, 8 Johns. 421.

<sup>2</sup> *Railroad Co. v. Yeiser*, 8 Pa. 366.

<sup>3</sup> 48 Cowen, 175.

<sup>4</sup> *Sunbury R. R. v. Hummell*, 27 Pa. 99; *Lehigh Valley R. R. v. Lazarus*, 28 Id. 203; *Huyett v. Reading R. R.*, 23 Id. 373; *Burroughs v. Housatonic R. R.*, 15 Conn. 125; *Lyman v. B. & W. R. R.*, 4 Cushing, 288.

well be had against a railway company for not using proper means for preventing the emission of sparks and cinders, or leaving combustible materials within the reach of sparks which accidentally escape ;<sup>1</sup> and the burden of showing that the engine was properly used and constructed would seem in such cases to rest on the defendants, as depending on facts presumably known to them, and that cannot readily be ascertained by the plaintiff.<sup>2</sup>

A different view was taken in *Fletcher v. Rylands*.<sup>3</sup> The action was brought for the flooding of the plaintiff's mine by the escape of water from a reservoir which the defendants had constructed on their own land ; and the law was laid down as follows in the Exchequer Chamber, and sustained in the House of Lords : "The person who for his own purposes brings on his land, and collects and keeps there, anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. . . . The person whose grass or corn is eaten or trodden down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own ; and it seems but reasonable and just that the neighbor who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. . . . And upon authority we think this is established to be the law, whether the things so brought be beasts, or water, or filth, or stench. . . . The law is clear

<sup>1</sup> *Huyett v. Reading R. R.*, 23 Pa. 373; *Cook v. Transportation Co.*, 1 Denio, 91.

<sup>2</sup> *Huyett v. Reading R. R.*, 23 Pa. 373; *Vaughan v. The Taff Vale Railway*, 3 H. & N. 743; s. c. 5 Id. 679.

<sup>3</sup> L. R. 1 Ex. 265, 277; L. R. 3 H. L. 330.

that, in actions for damage occasioned by animals that have not been kept in by their owners, it is quite immaterial whether the escape is by negligence or not. . . . There does not appear to be any difference in principle between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land water, filth, or stench, or any other thing which will if it escape naturally do damage. . . . And the case of *Tenant v. Goldwin*<sup>1</sup> is an express authority that the duty is the same, and he must keep them in at his peril." The liability for the escape of filth from a cesspool, or noxious fumes from "alkali works," is "founded on the general rule of law that he whose stuff it is must keep it that it may not trespass. There is no difference in this respect between chlorine and water: both will, if they escape, do damage, the one by scorching, and the other by drowning; and he who brings them there must at his peril see that they do not escape and do that mischief. There are many cases in which proof of negligence is essential, — as, for instance, where an unruly horse gets on the footpath of a public street and kills a passenger.<sup>2</sup> But this is because traffic on the highways cannot be conducted without some degree of risk, which those who frequent them knowingly assume; and the cases in which inevitable accident has been held to be an excuse for what is *prima facie* a trespass, can be explained on the same principle; namely, that the circumstances were such as to show that the plaintiff had taken the risk on himself."

It followed from the above principles that the defendants were answerable for the escape of the water, although they were not chargeable with negligence, and the accident was due to the proximity of a shaft in the plaintiff's mine of which they were ignorant.<sup>3</sup>

If such be the liability incident to keeping manure, cattle, water, — in short anything, however indispensable, that will be dangerous if it escapes, — it should obviously exist with

<sup>1</sup> 1 Salk. 21; s. c. 2 Lord Raymond, 1089.

<sup>2</sup> *Hammack v. White*, 11 C. B. (N. S.) 588.

<sup>3</sup> *Fletcher v. Rylands*, L. R. 1 Exch. 265; s. c. L. R. 3 H. L. 330.

regard to the element which is justly said to be the worst master if it gets the upper hand. It was apparently on this ground that an action lay at common law "on the general custom of the realm against the master of a house if a fire be kindled there and consumes the goods of another," and that the court said in *Tubervel v. Stump*<sup>1</sup> that "if a man kindles a fire in his field he must see it does no harm, and answer in damage if it does."<sup>2</sup> It was accordingly held in *Jones v. The Railway Co.*<sup>3</sup> that where a railway company has not been authorized by a statute to use locomotive engines it will be answerable for fires occasioned by the emission of sparks, although negligence is negatived by the evidence. The court cited *Fletcher v. Rylands* as conclusive that a man who keeps and uses an animal of known dangerous propensities on his land must keep it at his peril. The defendants were using a highly dangerous machine without any express parliamentary sanction, and were therefore answerable, under the common-law rule, for the consequences. The case was widely different where the use of locomotives was explicitly authorized by statute; and there could then be no recovery save on the ground of negligence.<sup>4</sup> It was decided in like manner in *Stone v. The Railroad Co.*<sup>5</sup> that casting smoke, cinders, and ashes from the defendant's locomotives on the plaintiff's dwelling was a trespass at common law, and could not be justified under the defendant's charter, save as an exercise of the right of eminent domain, attended with a liability for compensation.<sup>6</sup>

Notwithstanding the cogency of the reasons assigned in *Fletcher v. Rylands*, we may doubt whether the duty of "keep-

<sup>1</sup> 1 Salk. 13.

<sup>2</sup> *Filliter v. Phippard*, 11 Ad. & El. 346, 353; *Vaughan v. The Taff Vale R. R.*, 3 H. & N. 742, 747.

<sup>3</sup> L. R. 3 Q. B. 733.

<sup>4</sup> *Vaughan v. The Taff Vale R. R.*, 3 H. & N. 743; s. c. 5 Id. 679; 1 *Smith's Leading Cases* (8 Am. ed.), 498.

<sup>5</sup> 68 Ill. 394.

<sup>6</sup> 1 *Smith's Leading Cases* (8 Am. ed.), 489; *Hole v. Barlow*, 4 C. B. (N. s.) 334; *Bamford v. Turnley*, 3 B. & S. 61, 78, 80; *Board of Health v. Hill*, 13 C. B. (N. s.) 479, 484.

ing in " fire, water, and cattle can be reduced to a common standard and tested by the same rule. The storage of water under circumstances and in quantities which render it possible for it to break forth and be a source of damage, partakes of the nature of negligence, and may well render the doer answerable for the resulting loss; but can this be said of the careful introduction of water for household use, or of the fire on the kitchen hearth, mischievous as each may be to the neighboring dwellings if the pipes are ruptured by the frost, or a spark from the burning logs kindles some inflammable substance? Is a locomotive, built according to the most approved principles, and that can be run without injurious consequences, save in an exceptionally high wind or prolonged drought, analogous to a defective cesspool which infects an adjacent house? Such a cesspool is a nuisance, and therefore necessarily actionable; but can this be said of a locomotive, considered as part of a railway which would be useless without the aid of steam? Conceding that the benefit to the community cannot be set off against the damage to individuals in determining whether a thing is noxious if the injurious consequences might be avoided by a removal to another place or a change of means, does the rule apply where such a removal is impracticable, the means the best possible, and the thing as indispensable as the use of locomotives? <sup>1</sup> "It still appears," said Willis, J., in the case last cited, "an open question whether one who carries on a business under reasonable circumstances of place, time, and otherwise, can be deemed to be guilty of an actionable nuisance." <sup>2</sup>

I may add that there is no analogy between the duty of a railway company relatively to their locomotives, and the duty of a farmer to keep his cattle from straying; because a locomotive is not out of bounds while on the track, and the question is not whether it should be kept at the station, which

<sup>1</sup> 1 Smith's Leading Cases (8 Am.ed.), 489; *Hole v. Barlow*, 4 C. B. (N. S.) 334; *Bamford v. Turnley*, 3 B. & S. 61, 78, 80; *Board of Health v. Hill*, 13 C. B. (N. S.) 479, 484.

<sup>2</sup> *Hatch v. Railroad Co.*, 25 Vt. 49.

would be preposterous, but as to the liability of the company for the escape of the fire by which it is propelled.

The doctrine of *Fletcher v. Rylands* has been accepted in Massachusetts,<sup>1</sup> but is questioned or denied in some of the other States, as imposing an undue restraint on acts that may be essential to the beneficial use of land and ought not to entail loss in the absence of negligence,<sup>2</sup> and seems not to be applicable when the accident would not have occurred but for the wrongful act of a third person or a supervening *vis major* which could not have been guarded against or reasonably anticipated.<sup>3</sup>

"If one builds upon his own premises," said Erle, C.-J., in *Lovel v. Buchanan*, "and thus holds back and accumulates water for his benefit, or if he brings water upon his premises out of a reservoir, in case the banks of the reservoir give way and the lands of a neighbor are flooded he is not liable for the damage without some proof of fault or negligence on his part."<sup>4</sup>

Whatever the rule may be under other circumstances, a man is not answerable for the injurious consequences of an act done in the legitimate exercise of the right of self-defence, as when he turns aside a missile aimed at himself, and thereby diverts the blow to another.<sup>5</sup> A recovery cannot, therefore, be had against an owner for erecting a wall or embankment to repel the inroads of the sea or a river, and thereby causing the water to beat with greater violence against and injure the

<sup>1</sup> *Shipley v. Fifty Associates*, 106 Mass. 194; *Mears v. Dole*, 135 Id. 503.

<sup>2</sup> *Lovel v. Buchanan*, 51 N. Y. 477; *Marshall v. Moalwood*, 38 N. J. Law, 359; *Garland v. Towne*, 55 N. H. 57; *The Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 150; see *West Cumberland Iron Co. v. Kenyon*, L. R. 5 Ch. Div. 773; 11 Id. 787.

<sup>3</sup> *Nichols v. Marsland*, L. R. 10 Exch. 255; *Box v. Dubb*, L. R. 4 Exch. Div. 76.

<sup>4</sup> *Tapman v. Curtis*, 5 Vt. 371; *Shrewsbury v. Smith*, 12 Cushing, 177; *Bailey v. The Mayor*, 5 Hill, 531; 2 Denio, 433; *Pixley v. Clark*, 351 N. Y. 420; *Sheldon v. Sherman*, 42 Id. 484.

<sup>5</sup> *Scott v. Shepherd*, 2 Blackstone, 892; 1 Smith's Leading Cases (8 Am. ed.), 801, 802.

neighboring land.<sup>1</sup> For as Lord Tenterden observed, when all are assailed by a common enemy, each may do what is necessary to protect himself. The flow of surface-water is peculiarly within this principle, as not admitting of legal right or ownership; and it has been said that neither its retention, repulsion, nor diversion is actionable, though damage ensue.<sup>2</sup> An individual is consequently not responsible for turning the surface-water on to his neighbor's land by the erection of a wall or building, even when such is the avowed object, or he has reason to anticipate the result.<sup>3</sup>

Private or municipal corporations and companies acting under the right of eminent domain, stand in this as in other particulars nearly in the same relation to the owners of adjacent land as other coterminous proprietors,<sup>4</sup> and are neither bound to construct drains or sewers to carry off the rainfall from their streets or land,<sup>5</sup> nor liable for causing it to accumulate upon or flow over the neighboring land in consequence of an embankment, change of grade, or other act done in pursuance of the authority delegated by the legislature.<sup>6</sup>

A city or railway company cannot, however, any more than a private owner, concentrate the surface-water in an artificial channel and turn it on another's land, or close one or more of several channels so as to cause an undue outflow through the others; nor can they collect it in large quantities in a reservoir without being answerable for the consequences should it break forth.<sup>7</sup> There is, moreover, a distinction between non-feasance and misfeasance, and a liability may attach to doing a thing negligently although there would have been none had it remained unperformed. A recovery may accordingly be had against a municipal corporation for a defect in the con-

<sup>1</sup> *The King v. Pagham*, 8 B. & C. 335; 1 Smith's Leading Cases (8 Am. ed.), 498.

<sup>2</sup> *Bowlsby v. Speer*, 31 N. J. 351; *Hoyt v. Hudson*, 27 Wis. 658.

<sup>3</sup> *Turner v. Dartmouth*, 13 Allen, 291.

<sup>4</sup> *Flagg v. City of Worcester*, 13 Gray, 603.

<sup>5</sup> *Ross v. Clinton*, 46 Iowa, 606; *Hoyt v. Hudson*, 27 Wis. 656.

<sup>6</sup> *Flagg v. City of Worcester*, 13 Gray, 601.

<sup>7</sup> *Franklin v. Fisk*, 13 Allen, 211; *Pettigrew v. Evansville*, 25 Wis. 223.

struction of a culvert which allows the contents to escape and damage the adjacent dwellings; and it was said in *Ashley v. Port Huron*<sup>1</sup> that the obligation to construct sewers is legislative, but to keep them in repair is ministerial, and that an action will lie for a neglect of the latter duty, though not of the former. It is, moreover, an implied condition in every delegation of authority to construct a public work, that it shall be constructed with due care, so as not to be unnecessarily injurious to the community or to individuals, especially when the franchise is vested in a private corporation and to be exercised as a source of profit; and even if a private owner may build a wall or embankment along his entire frontage without leaving sluices for the passage of the surplus water, such an omission may be a culpable neglect of duty on the part of a railway company.<sup>2</sup>

It is not less clear that whatever rights or ownership a State may have over the bed and waters of a navigable stream, it cannot, even for the legitimate purpose of improving the navigation, so obstruct the channel as to overflow the lands on either side, without compensation, because the owners are as much deprived of their property by such a submersion as they would be by an actual entry and expulsion.<sup>3</sup> The question arose in *The Grand Rapids Booming Co. v. Jarvis*,<sup>4</sup> out of the obstruction of a stream by a boom laid across the channel to collect and hold the logs which were floated down to a market; and that flooding a man's land without his consent is a taking within the constitutional provision, was said to be a self-evident proposition which could not be made clearer by argument.

The decisions in Pennsylvania may seemingly, with few exceptions, be reconciled with the above principles, if it be con-

<sup>1</sup> 35 Mich. 296, 300.

<sup>2</sup> *Hatch v. Vermont Central R. R.*, 25 Vt. 68, 70; *Toledo R. W. Co. v. Morrison*, 71 Ill. 616.

<sup>3</sup> *Arimond v. Green Bay Co.*, 31 Wis. 316; *Hooker v. New Haven Co.*, 14 Conn. 146; *Rowe v. Granite Bridge Co.*, 21 Pick. 344; *Nevins v. Peoria*, 41 Ill. 502, 510; *ante*, p. 384.

<sup>4</sup> 30 Mich. 321.

ceded that the right of the Commonwealth to the highways is absolute, and covers every act that would be legitimate if done by an individual on ground which is his own. That cannot be a public nuisance which is authorized by the legislature, and there can be no injury to private right where none exists. The distinction is exemplified by the cases of the Barclay R. R. Co. *v.* Ingham,<sup>1</sup> and the New York & Erie R. R. Co. *v.* Young.<sup>2</sup> In the latter instance the court denied, and in the former awarded, compensation for the diversion or backing of a stream under an authority conferred by statute, and thereby rendering the water of a dam, which the plaintiff had built under a license from the State, less available as a source of water-power; the distinction being that in the Railroad Co. *v.* Young the dam was situated on a navigable river which belonged exclusively to the State, while in the Railroad Co. *v.* Ingham the stream was private property, and the legislature were no more entitled to impair water-power without compensation, than to appropriate the solid ground.

The case of Richardson *v.* The Central R. R. Co.<sup>3</sup> is not less instructive. The defendants there made a deep cut for the passage of their railway on their own land so near the plaintiff's as to cause his land to slide into the excavation by its own weight, and then carried the track across the highway in front of the plaintiff's house so as to render it virtually inaccessible to his teams and carriages. He claimed compensation for both injuries, and the court held that he was clearly entitled under the first head. The defendants had not exceeded the authority conferred by their charter, nor had they removed any portion of the plaintiff's soil directly; but they had done that which disturbed the natural equilibrium of the strata, and in so doing had caused the plaintiff's ground to fall. The action did not depend on negligence, but on the principle that one who did that, however carefully, which tended to the subversion of another's right was answerable for the consequences. The second count could not be sustained. The plaintiff might have recovered on proof that the highway was obstructed and that he had thereby sustained some injury

<sup>1</sup> 36 Pa. 194.

<sup>2</sup> 33 Pa. 175.

<sup>3</sup> 25 Vt. 465.

peculiar to himself; but there was no such allegation, and he was not entitled to compensation for the loss occasioned by a change of grade which every owner is entitled to make on his own ground. Two inferences may be drawn from this decision,—that the right of eminent domain is not a defence for acts which would be actionable if done by an individual on land which belongs to him, and that where a private owner would not be answerable, compensation cannot be demanded from the State or the persons whom she authorizes or employs.

If the above view is just, the public right is measured in this regard by the same standard as the private; and if a statute may be pleaded in justification of injuries that would constitute a private nuisance if occasioned by an individual, it can only be by virtue of the right of eminent domain, attended with compensation. Conceding that the streets belong absolutely to the Commonwealth, and may be handed over to a railway company if such is her pleasure, the company should still abstain from acts that render the adjacent buildings unfit for use or habitation, and their liability will depend on the principles which govern the relations between neighboring proprietors. The street is theirs; but if they use it in a way to cause a greater annoyance than one neighbor may, in the necessary prosecution of his business, legitimately inflict on another, compensation may be obtained by suit, or a bill filed for an injunction. The legislature have not the omnipotence of Parliament, and cannot deprive any man of his property without compensation; and such a deprivation occurs whenever lands, tenements, or hereditaments are rendered valueless by an act which would afford a ground for damages at common law.<sup>1</sup>

In *Stone v. Fairbury R. R. Co.*<sup>2</sup> the plaintiff was accordingly allowed to maintain trespass for the smoke, sparks, and cinders cast on his house by the defendant's locomotives, although they were run under an authority conferred by the

<sup>1</sup> *McCombs v. Akron*, 15 Ohio (o. s.), 414; 18 Id. 229; *Crawford v. The Village of Delaware*, 7 Ohio St. 468.

<sup>2</sup> 68 Ill., 394.

legislature, and there was no allegation of negligence. It has nevertheless been decided in Pennsylvania that a legislative grant or charter may be pleaded as a justification for flooding an extensive tract of land, or converting it into a malarious pool and keeping it in that condition, as a means of supplying a canal or other public work with water, although the exhalations are eminently injurious to property and health, and the sufferers have no means of redress or compensation.<sup>1</sup> Read, J., said, in the case first cited, that works of internal improvement erected at the expense, and by the officers of the State, for the benefit of the citizens at large, could never be regarded by the law as a nuisance, because they were intended to advance the prosperity of the community; and it made no difference that the power had been delegated in the case under consideration to a private corporation, because there was an express requirement that it should be exercised for the purposes of the canal as a public highway.

Much stress was laid on the public nature of the work in this instance; but if the injury occasioned by a nuisance is not a deprivation in the sense of the Constitution, it may apparently be sanctioned for a private purpose, and if it is a deprivation, compensation is due, although the purpose is public.

It has been held on like grounds in other instances that there can be no recovery for the loss occasioned by the sinking of the plaintiff's land into an excavation made with a view to grading the adjacent street, although there is no superincumbent structure, and the injury is due exclusively to the removal of the lateral support,<sup>2</sup> contrary to the general rule that a man may not dig so near to his neighbor's ground as to cause it to fall by its own weight. It is nevertheless conceded, even under this course of decision, that a legislative grant or charter will not be a justification for an act that

<sup>1</sup> *The Commonwealth v. Reed*, 34 Pa. 275; *The West Branch Co. v. Mulliner*, 68 Pa. St. 357.

<sup>2</sup> *Boothby v. The Railroad Co.*, 51 Me. 318; *Radcliff v. The Mayor of Brooklyn*, 4 Comstock, 196, 203.

would otherwise be wrongful, simply because it is an efficient means for the accomplishment of the purpose which the legislature had in view, because public grants are to be interpreted favorably to the Commonwealth, and it will not be presumed that it meant to inflict injury without compensation.<sup>1</sup>

It results from what has been said, that the right to compensation for losses occasioned by the exercise of the power of eminent domain may be classified as follows: 1. Where the whole of the lot or ground is taken. 2. Where part only is taken. 3. Where redress is sought for acts done on land belonging to other persons and appropriated by the State to public use.

It is settled under the first head that the complainant is entitled to the full value of the land, as estimated by the price which it would bring if it was offered under favorable circumstances, or which could be obtained for property of a like kind and similarly situated, but without regard to any special value which it may have for him, or which he sets upon it, in view of the length of time during which it has been his abode, its proximity to his place of business, or other reasons of a like kind. The rule, however, is not so rigorous as to preclude an inquiry as to the sum for which it could be rented, or in the case of a manufactory what it will cost to move the machinery and fixtures elsewhere and put them up in the same order and condition.<sup>2</sup> Whether the loss of profits can be taken into view is a difficult question, depending seemingly on the authorities which apply where it grows out of a breach of contract.

The principle is the same as regards cases arising under the second head, — that the owner shall be placed pecuniarily where he stood before the power was exercised, and therefore that all the consequences which are not too indirect or remote must be considered in assessing the damages.

One who is compelled to sell part of a tract may reasonably

<sup>1</sup> The Delaware Canal Co. v. The Commonwealth, 50 Pa. 399; Jones v. Chicago R. R. Co., 68 Ill. 380.

<sup>2</sup> Philadelphia & Reading R. R. Co. v. Getz, 113 Pa. 214; 105 Id. 547.

insist that he shall not be a loser by the transaction, and therefore that the effect upon the residue shall be duly considered. If, for instance, a track is laid across the plaintiff's curtilage and the embankment will darken the windows of his shop or dwelling, he should obviously be compensated, not merely for the intrinsic value of what is taken, but for the depreciation of what is left. A man who sells a strip of his farm voluntarily to a railway company may guard against the consequences by covenants, or by demanding a larger price; and he should not be in a worse position where the transfer is compulsory and he cannot protect himself.<sup>1</sup>

"It is," said Strong, J., in the case first cited, "upon the whole tract that the railroad is located, though only a part is actually occupied. The injury is therefore done to the tract as a whole, of whatever components that injury may consist. The exclusive appropriation of a part, the inconvenience arising from division, or from increased difficulty of access, and the cost of additional necessary fencing, are alike the direct and immediate result of the construction of the railroad. Nothing can be recovered for anything which is not a ground for damages at common law; but the construction given to the legislative charters for improvement companies generally, has been that they are intended to secure compensation for all such injuries as the common law recognizes as fit subjects for compensation."

The cases arising under the third head cover a debatable ground which has been the theme of a protracted controversy; but agreeably to the main current of opinion, the complainant cannot recover short of a constitutional or legislative provision, unless he has a right of property in the land on which the act is done, or it operates indirectly as a "taking" of other land in which such a right of property exists. The effect was, as has been seen, to preclude compensation in numerous instances where the injury was not less real than

<sup>1</sup> *Watson v. P. & C. R. R.*, 37 Pa. 469; *Hyde Park v. Dunham*, 85 Ill. 574; *Page v. The Railroad*, 70 Id. 328.

where it was allowed, and relief would clearly have been due under the English statutes.<sup>1</sup>

There is, moreover, a great diversity of opinion as to the interpretation of the rule and the cases to which it is applicable, and the decisions are not only discordant as a whole, but fluctuate so much in some of the States as to afford no certain guide. While the right of the owner of an abutting lot to the unobstructed use of the street is held to be clear in Ohio and Indiana on general principles, and a just ground for compensation if violated, and the test is said in Illinois and Iowa to be "Does he own the fee?" this criterion was rejected in Pennsylvania, as not affecting the paramount authority of the legislature. It is not surprising, therefore, that a need should have been felt for so amending the constitutional guaranty as to afford a remedy wherever the interests of individuals were sacrificed to the general good. The right to compensation is accordingly extended in Illinois, West Virginia, Georgia, Colorado, and Nebraska, beyond the taking of property for public use to cases in which it is damaged or injured, while "destroyed" is also added in Pennsylvania and Texas.<sup>2</sup>

Had these States adopted the liberal doctrine that the owner of a house or land has a right in the street on which it fronts, and that a physical injury to property from the exercise of the right of eminent domain is in effect a "taking," there would have been less necessity for such an amendment; and we may believe that the main object of the change was to place the law on this basis as adopted in Ohio and Indiana, and measurably in Illinois.

The just inference would consequently seem to be that under this enlargement of the Constitutional guaranty, if not agreeably to the clause as it was originally framed, an owner is entitled to compensation for any act done in the exercise of the right of eminent domain by which his property is injuriously affected, and which would be actionable at common

<sup>1</sup> *Rigney v. Chicago*, 102 Ill. 64, 82; *Kucheman v. Railroad Co.*, 46 Iowa, 366.

<sup>2</sup> See *The Penn. R. R. Co. v. Lippincott*, 19 Weekly Notes, 512; *post*, 422.  
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law were it not authorized by the legislature. As the rule formerly stood, there was no claim for indemnity unless there was an invasion of private right. As it now stands, there may be a recovery for an injury to a private right occasioned by the invasion of a public right.

In *Rigney v. The City of Chicago*,<sup>1</sup> the complainant owned a house in Kinzie Street, and the city constructed a viaduct which cut off all communication with Halsted Street through Kinzie Street, save by a stairway. Halsted Street is one of the main thoroughfares of Chicago, and traversed by a horse-railway; and it was averred and proved that the alteration had lessened the value of the plaintiff's dwelling by two thirds, and reduced the rental from \$60 per month to \$25.

The court said in substance that as the complainant had no private right in the street and there was no physical injury to the house, he could not have recovered under the Constitution as originally worded, but that it was also clear that there was a physical alteration of the street which rendered his property in the house less valuable, and would have been a cause of action, had it not been made under an authority conferred by ordinance; and he was consequently entitled to compensation. The rule as deduced from the language of the Constitution as amended, and the English decisions on the analogous question arising under the Lands Claims Consolidation Act, was said to be that to warrant a recovery it must appear that there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property, in excess of that sustained by the public generally.

In the absence of any statutory or constitutional provision on the subject, the common law afforded redress in all such cases; and it was undoubtedly the intention of the framers of the present Constitution to require compensation to be made wherever, but for some legislative enactment, an action

<sup>1</sup> 102 Ill. 79.

would lie by the common law.<sup>1</sup> The complainant should therefore be indemnified for the entire amount of the loss as established by the proofs. In like manner, a recovery may be had in England for the erection of an embankment in a public dock under an Act of Parliament, and thereby rendering the plaintiff's house less accessible, or cutting it off from the river, although he has no right or easement in the land so appropriated, because the structure would be illegal if not authorized by the legislature; and he sustains a damage which is peculiar to himself, and in excess of that occasioned to the community.<sup>2</sup>

It follows conversely that when the injury is not one for which an action would lie at common law, compensation will not be due simply because the act complained of is done under an authority conferred by the statute. The transfer of a courthouse to another town or quarter may enhance the value of the latter locality and depreciate that of the former; but the persons who suffer from the change are no more entitled to compensation than a hotel or shopkeeper would be for the loss occasioned by the removal of a railway station or depot.<sup>3</sup>

The question arose in *Chicago v. The Union Building Association*<sup>4</sup> on a bill in equity averring that the complainants were the owners of a hotel in La Salle Street, in the neighborhood of a building occupied by the Board of Trade, and that an ordinance had been passed by the City Councils to vacate so much of La Salle Street as lay between Van Buren and Jackson Streets, with a view to the removal of the Board of Trade to that locality, and that complainants would suffer great damage to their property, in common with the other property-holders on La Salle Street, if the ordinance was carried into effect, and concluding with a prayer for an injunction. The decision was, that to maintain an action

<sup>1</sup> *Rigney v. The City of Chicago*, 102 Ill. 64, 81; *The City of Chicago v. The Union Building Association*, Id. 380, 384; *McCarthy v. Metropolitan Board of Works*, 43 L. J. C. P. 385.

<sup>2</sup> *McCarthy v. Metropolitan Board of Works*, 43 L. J. C. P. 385.

<sup>3</sup> *Rigney v. Chicago*, 102 Ill. 64.

<sup>4</sup> 102 Ill. 380.

for the obstruction of a common and public right, the plaintiff must show some injury peculiar to himself, and could not recover for damages of the same kind as those sustained by the general public. The bill did not come within this principle. The part of La Salle Street to be vacated was a third of a mile distant, and the only injurious consequence was that persons passing from his property down the street would have, on arriving at the obstruction, to go a little farther and make a slight detour, — precisely the same injury that would be sustained by every person having to pass by that route. It followed that there was no such special damage as would have been a cause of action at common law, had the street been obstructed by an individual, and consequently nothing that could give a right to compensation from the State. The proposed removal of the Board of Trade was not a natural or necessary consequence of the vacation of the street, and would, agreeably to the answer, take place at all events.

It may be observed that there was no physical disturbance of the complainant's rights, and that the ordinance was simply a waiver of the public right, which precluded the obstruction of the street while it remained in force. The case did not, therefore, come within the letter of the rule as stated in *Rigney v. Chicago*, although a statutory deprivation may, as we have seen, be a ground for compensation where no act has been done to carry it into effect (*ante*, p. 383).

Agreeably to the Constitution of Pennsylvania, as modified in 1874, not only is compensation due for property taken, injured, or destroyed under the right of eminent domain, but it is further declared that "municipal and other corporations and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction."<sup>1</sup> In *Hendrick's Appeal*,<sup>2</sup>

<sup>1</sup> See *The New Brighton v. The United Presbyterian Church*, 96 Pa. 331, 335; *The Penn. R. R. Co. v. Duncan*, 111 Pa. 354, 360.

<sup>2</sup> 103 Pa. 350.

the court held that an abutting owner was entitled to damages for a change of grade, under this provision, whether the street had or had not been previously graded by the authorities.<sup>1</sup>

The question naturally arises: What is the effect of such an amendment on charters already granted? And the answer would seem to depend on whether it confers a new right, or simply enlarges the remedy. Agreeably to the dicta in *Coons v. The Monongahela Navigation Co.*, pre-existing corporations were in this regard, as in many others, beyond the reach of constitutional or legislative change, and might, as they had previously done, lay a railway track through the streets of a city, or flood land occupied as a mill site or for agricultural purposes, without being answerable in damages.<sup>2</sup>

Such a conclusion is extreme, and may be thought questionable. The Constitution of the United States undoubtedly precludes a State from impairing the obligation of contracts even through an amendment of its organic law; but this restriction has never been held to forbid such remedial legislation as may be requisite to give effect to antecedent rights, or provide a remedy for injuries that previously went unredeemed. A child was entitled to support from its father at common law, but could not recover damages for the frustration of this right through the parent's death from injuries occasioned by the negligence of an individual or body corporate. The acts which now afford a remedy for such deprivations, and under which damages are constantly assessed and judgments rendered, is of recent origin, and were passed since the majority of the great railroad companies were incorporated; and yet it has never been contended that they are invalid as to pre-existing corporations, or impair their chartered privileges. In like manner the citizen has a natural right to compensation for the consequences of acts done for the public benefit that are injurious to his estate or person, and a statute which affords a remedy cannot justly be assailed as unconstitutional. Such an argument would obviously be fallacious if advanced on behalf of an individual, and the

<sup>1</sup> *New Brighton v. The Church*, 96 Pa. 331.

<sup>2</sup> *Ante*, 386.

principle is the same when the defendant is a corporation. A power conferred by a charter cannot be abrogated without impairing the obligation of the contract; but the legislature does not, in making such a grant, contract that persons who are injuriously affected by the exercise of the power shall not be entitled to indemnity, nor that it will not provide a means for rendering their demand effectual. The principle may be tested by supposing the incorporation of a railway company in a State where there is no constitutional restraint on the right of eminent domain, and the subsequent enactment of a law providing that land shall not be taken for the use of the road without payment. Would such a statute conflict with the Constitution of the United States?

This question has been answered affirmatively in Pennsylvania, where the incorporation of a railway or other improvement company with the right of eminent domain is interpreted as a contract that the right may be exercised without liability for the consequences, however injurious or destructive, unless there is an actual taking; and a remedy cannot therefore be given for such injuries as against pre-existing corporations by the legislature or through an amendment of the State Constitution consistently with the Constitution of the United States. The Pennsylvania R. R. Co. might consequently have constructed an elevated railroad through any street in Philadelphia without compensating the owners of the buildings on either side, had they not accepted an amendment to their charter which brought them within the scope of the new Constitution of that State.<sup>1</sup>

<sup>1</sup> See *The Pennsylvania R. R. Co. v. Duncan*, 111 Pa. 352, 364; *ante*, p. 386.

The doctrine that a railway company, like other owners, may put their property to any appropriate use, short of a nuisance, however detrimental or injurious it may be to the adjacent land or dwellings, without being answerable in damages, was applied in the recent case of the *Pennsylvania R. R. Co. v. Lippincott*, 19 Weekly Notes, 512, and carried to a point which many persons will regard as beyond the mark (*ante*, pp. 397, 402).

The plaintiff was the owner and occupier of a house on the north side of Filbert Street; and the defendants, under the authority conferred by their charter, built and operated an elevated railway on the south side of

the same street on land which they had acquired by purchase or through the right of eminent domain. The noise, dust, smoke, and cinders of the defendants' locomotives rendered the plaintiff's dwelling almost valueless for sale and as a place of abode, and the action was brought to recover compensation for the loss. The trial court was requested to instruct the jury that the defendants "had full lawful authority to erect and operate their road in the manner complained of, without liability for the consequential damages." This direction was refused, and the jury were instructed that the measure of damages was the difference between the market value of the property before and after the construction of the elevated railway.

The case came on a writ of error before the Supreme Court of the State, which reversed the judgment on the ground that if the plaintiff had any valid claim, it was only for the discomfort and inconvenience actually sustained, and not for the loss of market value. Under the instruction given by the court the same rule was applied in assessing the damages "as that which applies in the case of an appropriation or taking under the right of eminent domain, excepting, of course, that as no property of any kind was taken, that element of damage was not considered. This instruction, together with the negative answer of the court to the defendants' first point, raises all the questions that require consideration in this case. That there was error in the instruction above stated, is to us very clear. This structure having been erected on the defendants' own land, and no property or right of the plaintiff having been seized, appropriated, or interfered with, we cannot understand how a rule which applies only to a taking, and never did apply to anything else, can be adapted to a case where there has been no such taking. It is not pretended that the erection itself did the plaintiff any harm, but its use only; that is, the running of locomotives on it. . . . As was said in the *Railroad Co. v. Yeiser*, 8 Pa. 366, by Mr. Justice Rogers: 'It is a principle well settled by many adjudicated cases that an action does not lie for a reasonable use of one's right, though it be to the injury of another. For the lawful use of his own property a party is not answerable in damages unless on proof of negligence.' How then, we ask, can a lawful erection by the Pennsylvania R. R. Co. on its own ground be the subject of damage to the adjoining landowners? And why may it not, as put by the defendant's first point, operate and use in a lawful manner its Filbert Street branch without subjecting itself to an action for damage? It seems to be very clear that a private person could do with impunity on his own property just what the railroad company has done. He might build a house, and thus shut out his neighbor's view, light, and air; he might build an embankment or run a road on or along his own line, and be liable for nothing as long as he used his house, embankment, or road in a lawful manner, although in either case an injury may have been done to the adjacent property. . . .

It is contended, however, that this case is governed by the Constitution of 1874, which provides (Art. XVI., sect. 8): 'Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed in the construction or enlargement of their works, highways, or improvements,' and the cases of *Pusey v. The City of Allegheny*, 98 Pa. 522; *Pittsburgh Junction R. R. Co. v. McCutcheon*, 18 Weekly Notes, 527; *Pennsylvania R. R. Co.'s Appeal*, Id. 418; and the *Pennsylvania R. R. v. Duncan*, 111 Pa. 352, are cited in support of the rule contended for by the plaintiff. But it is a mistake to suppose that these cases are in point. . . . In the case in hand the plaintiff sustained no injury from the construction of the viaduct; none of his property was taken, neither were any of his rights infringed; so that neither by the Constitution nor by the cases quoted is there a warrant for the plaintiff's contention. We agree that over and beyond the damages which arise from a taking of property, whether in the shape of land or a right, the Constitution does impose on corporations a direct responsibility for every injury for which a natural person would be liable at common law. So we have held in the case of *Edmundson v. The Railroad Co.*, 111 Pa. 316, and to this doctrine we adhere, for such we think is the spirit of that instrument; but beyond this we cannot go. . . . That the defendant might have hauled its freight and passengers by ordinary carriages drawn by horses from its West Philadelphia depot through Filbert Street to its station at Broad and Market without the risk of actionable damage, will, I suppose, not be doubted; yet certainly the resulting noise, dust, and annoyance to the adjacent property-holders would in such case be greater than under the present arrangement. Why, then, for a better method of transportation shall it be held liable? To this question no answer has been given but the dogmatic one already alluded to: 'The Constitution so provides.' But as the Constitution does not so provide, and as the plaintiff's contention has no support either in statute or common law, we must refuse to entertain it."

The questions mooted in this case would seem to depend on whether the legislature can constitutionally subtract anything from the sum of rights which constitute property except in the exercise of eminent domain, and subject to the duty of indemnifying the person who suffers by the act (*ante*, p. 384). On this head the clauses which forbid deprivation save by due process of law, and provide that property shall not be taken for public use without compensation, give the rule; or, rather, the former is the rule, and the latter the only exception. Together, they cover the whole ground, and preclude the supposition that spoliation can be practised on the pretence that it is merely consequential, and does not amount to a taking (*ante*, pp. 384, 396). The justification for a deprivation of private rights is that the general good exceeds the individual loss; and when such is the case, the community are legally and morally bound

to compensate the person whose interests are sacrificed for their benefit. The artificial rule laid down in Pennsylvania that to constitute a taking and give a claim to indemnity there must be an "assumption" of possession on the part of the State or her delegates, as well as a dispossession of the owner, or, in other words, that so long as his land is not entered upon or occupied for a public purpose, it may be submerged or rendered unfit for use or habitation, is contrary to the main current of decision, and has been repudiated in New York, and by the Supreme Court of the United States (*ante*, pp. 386, 388).

The main object of the convention which framed the amended Constitution of Pennsylvania in 1874 in providing that "corporations or individuals invested with the privilege of eminent domain shall make just compensation for private property taken, injured, or destroyed in the construction of their works, highways, and improvements," was to erase this blot and afford a remedy wherever an injury is inflicted for a public purpose, and would have afforded a ground for compensation had it not been authorized by the legislature. See *Rigney v. Chicago*, 102 Ill. 79; *ante*, p. 418. It may well be, as the court held, that the convention did not intend to make corporations or individuals answerable in damages for acts done on their own land, and that would not have been actionable had no authority been given by the State; but they obviously did intend to confer a right to damages wherever a legislative authority is relied on as a justification for acts that would operate as a nuisance or deprivation at common law (*ante*, pp. 396, 418).

The conclusion reached in *Lippincott v. The Pennsylvania R. R. Co.* would also seem questionable on another point. Limiting the right of action to cases where the loss is occasioned by the "enlargement or construction" of a railway or other public work, as distinguished from its "operation," renders the remedial clause above referred to almost a dead letter, because in a great majority of instances the loss results, not from the grading of the roadbed or laying of the rails, but from the uses to which they are put.

A traction or horse railway, as experience shows, may be laid through a populous town not only without detriment, but advantageously to traffic and the property owners on either side; but the case is widely different where locomotives are used, with the attendant noise, dust, cinders, and smoke. It is therefore illogical and unjust, in assessing damages for the construction of a railway under a legislative grant, to disregard the purpose for which the road was chartered, and not only may but must be employed; and the work and all that will necessarily follow from it should, on the contrary, be viewed as a whole. Such is the established rule where the track is laid on the plaintiff's land or in the street in front of his dwelling; and the convention cannot reasonably be supposed to have intended to confine the right of action for the damages occasioned by the construction of a railway on land acquired from third persons

within narrower bounds, which would exclude the "operation" of the road and make the remedy unavailing.

The measure of damages in such cases would seem equally clear. Where suit is brought for a deprivation not authorized by law, the recovery is limited to the amount of loss sustained at the time of action brought or verdict rendered, because the presumption is that the defendant will desist from a course which the judgment shows to be erroneous, and if he does not, the plaintiff may have redress through an injunction, or successive verdicts may be rendered for exemplary damages until the nuisance is abated. Such a rule is obviously inapplicable where the act complained of is sustained by the legislature for a public end, and the wrong consists not in what is done, but in the failure to make compensation. Under these circumstances the case falls within the principle of eminent domain, because the defendant not only may, but ought to persist, and justice requires that the controversy should be closed at once, by giving the plaintiff the full amount of the depreciation occasioned for the common benefit.

## LECTURE XXI.

Regulation of Commerce. — Internal and Foreign Commerce of the Colonies before the Adoption of the Constitution. — Nature and Extent of the Power to regulate Commerce given to Congress by the Constitution. — Relation of Treaties to Legislation. — Purely Internal Commerce. — Trade-marks. — Judicial Regulation of Commerce. — Conflict of State and Federal Jurisdiction. — Federal Power over Commerce, how far exclusive. — State Power over Commerce. — Pilotage. — Quarantine. — Improvement of Harbors and Rivers.

THE trite remark, that free institutions are favorable to the growth of trade, is abundantly verified by the colonial history of the United States; but other causes contributed to the development of the marvellous commercial enterprise which characterized that period and afforded an outlet for the energy which has since been manifested in so many ways. A country peopled by an adventurous race, with a long line of coast indented by innumerable bays, could hardly have been insensible to the benefits of commerce under any form of government. Before the introduction of manufactures, and while the far-stretching West was still unexplored, the sea was the only theatre where the New England man could gratify the love of adventure, the desire for gain, the thirst for success, which are such marked features of his nature. His ships soon visited every shore, and explored the unknown recesses of the most distant seas. Such maturity of enterprise in a people who were still in the gristle, and had not hardened into the bone and sinew of manhood, struck the vivid fancy of Burke and became the theme of one of his most eloquent speeches. Philadelphia was also noted as a commercial centre; and if the Southern States were chiefly devoted to agriculture, they were still, in another sense, dependent on commerce as the means of exchanging their

great staples, wheat and tobacco, and at a later period rice, for the luxuries and comforts afforded by the arts and sciences of Europe. That a people whose sails might be desried on every sea, and who had long been secure under the protection of Great Britain, should be unable, from their feeble and disunited condition, to make their flag respected abroad, or even beneath the shadows of their own headlands, was one of the mortifications which were experienced under the Confederation, and induced the wish for a stronger government. This evil might have been endured in the hope that it would disappear as increase in wealth and population rendered America an enemy which it would be dangerous to provoke ; but there was another that demanded an immediate remedy. The trade of a great and growing people, who in interest, language, boundaries, and religion, were really one, was under the existing system regulated by the legislatures of thirteen distinct and petty sovereignties which could not reasonably be expected to unite in any general or common principle. The States which held the bays and rivers which were the great avenues of commerce, endeavored to take an undue advantage of their position. The other States resorted to retaliation. A license to sail from New Haven or from Philadelphia was not a license to land in Rhode Island or New York. New York might, and as we shall see did, pass laws excluding steamers owned in New Jersey or Connecticut from her waters, and those States were not slow to imitate the example set by New York. It was conceivable that similar barriers might be raised between Philadelphia and Burlington or Wilmington. The States might discriminate in favor of their own vessels by imposing higher rates of tonnage on vessels coming from other States. Where uniformity was essential there was not only a want of order and method resulting from the absence of any fixed or general rule, but the disorder and confusion which different and inconsistent rules naturally tend to produce. One of the reforms urgently demanded by the public voice, and introduced by the Convention, accordingly was that Congress should be empowered "to regulate commerce with

foreign nations, among the States, and with the Indian tribes."

This power was exercised from the outset of the government, but did not receive a judicial construction until 1824. It was then established by Chief-Justice Marshall on a basis that has not been shaken. His judgment gave at once the measure of the authority of Congress, and showed how far the grant to the United States operated as a prohibition to the several States.<sup>1</sup> The history of the controversy would be enough, without other proof, to show the evils that attend on State legislation where the subject is one of national concern.

During the first years of this century the State of New York granted to Robert R. Livingstone and Robert Fulton the exclusive navigation of all the waters of that State by boats moved by fire or steam; and Ogden, claiming under the grantees, filed a bill alleging that Gibbons, the defendant below, was in possession of two steamboats which were actually employed in running between New York and Elizabethtown, in violation of the complainant's privilege, and praying that Gibbons might be enjoined from using the said boats, or any others propelled by the same means, within the territory of New York. The answer set forth that the boats employed by Gibbons were duly enrolled and licensed to be used in carrying on the coasting-trade under the act of Congress passed February 19, 1793, entitled, "An act for enrolling and licensing vessels to be employed in the coasting-trade, and for regulating the same," and insisted that the defendant was thereby entitled to navigate the waters between New Jersey and New York, notwithstanding the exclusive privilege granted by the legislature of the latter State to the complainant. A perpetual injunction having been awarded by the Chancellor, and the decree affirmed in the Courts of Errors, the case was brought before the Supreme Court of the United States by appeal.

The two questions arose on the facts as set forth of record which are involved in all the enabling clauses of the Constitution, — one as to the nature and extent of the grant to the

<sup>1</sup> *Gibbons v. Ogden*, 9 Wheaton, 1.

General Government; the other, how far it is a restraint on the States: in other words, whether what is bestowed on it is impliedly withheld from them.

Mr. Webster, as counsel for the appellants, said that steamboats were in general use on the coasts and in the inland waters of the United States. Rivers and bays formed in many cases the divisions between States; and if the States made hostile or repugnant regulations, serious and embarrassing consequences would follow. By the law of New York, no one could navigate the Bay of New York, the North River, the Sound, or any of the waters of that State, by steam vessels, without a license from the grantees of New York under penalty of a forfeiture of the vessel. Under the law of the State of Connecticut no one could enter her waters, which were to a considerable extent the same waters, with a steam vessel having such a license. By the law of New Jersey any citizen of that State who was restrained by virtue of the New York law from using steamboats between New Jersey and New York, was entitled to an action for damages in New Jersey, with treble costs against the party who restrained or impeded him under the law of New York. It would hardly be contended that all these acts were consistent with the laws and Constitution of the United States. If there was no power in the General Government to control this conflict of legislation between the States, the Constitution was deficient in a most important particular. He was, however, prepared to contend that the power of Congress to regulate commerce was complete, and to a certain extent necessarily exclusive, and that the law of New York was a regulation of commerce affecting it in those respects in which it was subject to the exclusive authority of Congress. He did not mean to say that all acts which might affect commerce were forbidden to the States, but that the States did not retain the power which New York claimed and exercised. Some powers were holden to be exclusively in Congress from the use of exclusive words in the grant; others from a prohibition to the States to exercise similar powers; and others again from the nature of the powers themselves.

Of two powers given in the same terms, one might be exclusive, and the other not, from a difference in the subjects to which they applied. And this might be true of the same power relatively to different subjects or to different parts of the same subject. It was in vain to look for a precise definition of the exact powers of Congress in the Constitution. That instrument did not undertake the task of making such definitions. In conferring powers it proceeded in the way of enumeration, stating the powers conferred one after another in a few words, and where the power was general or complex, the extent of the grant must be defined by its object and the nature of the power. One chief motive for the adoption of the Constitution was to regulate commerce, to rescue it from the conflicting legislation of so many different States, and to place it under the protection of a uniform law. It was therefore requisite that the power should not only be conferred on Congress, but be taken from the States. The very nature of the case required that the authority in question should be exclusively committed to a single hand. The object was that the commerce of the States should be a unit, and should be subject to one complete and uniform system. If the States could legislate concurrently with Congress, and pass different and conflicting laws, this end could not be attained.

In delivering judgment, Chief-Justice Marshall said that the grounds on which the appellant sought to reverse the decision of the court below were, in the first place, that the law of New York was repugnant to the clause in the Constitution authorizing Congress to regulate commerce. It had been said that the powers conferred by that instrument should be construed strictly. But why should they be so construed? In the last of the enumerated powers which gave them the means to carry all others into execution, Congress were authorized to make all laws which were necessary and proper for the purpose. But this limitation on the means which might be used was not extended to the powers which were conferred, nor was there one sentence which prescribed such a rule. What did the gentlemen mean

by "strict construction"? If they contended only against that enlarged construction which would extend words beyond their natural and obvious import, the court might question the applicability of the term, but would not controvert the principle. If they contended for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the government those powers which the words of the grant, as usually understood, imported, which would cripple the government, and render it unequal to the objects for which it was declared to have been instituted, then the court could not perceive the propriety of this strict construction, nor adopt it as the rule by which the instrument was to be expounded. The words of the Constitution were, that Congress should have power to regulate commerce with foreign nations, among the several States, and with the Indian tribes. The subject to be regulated was commerce, and as the Constitution was one of enumeration and not of definition, to ascertain the extent of the power it was necessary to settle the meaning of the word. It had been said that it should be limited to traffic, the buying and selling or interchange of commodities, and did not comprehend navigation. Such an interpretation would restrict a general term, applicable to many objects, to one of its significations. Commerce undoubtedly was traffic; but it was something more, it was intercourse. Navigation, as one of the means through which intercourse was obtained and the exchange of commodities effected, consequently could not be left out of view in a system for regulating commerce. If commerce did not include navigation, the General Government had no direct power over that subject, and could make no law prescribing what should constitute an American vessel, or requiring that it should be navigated by American seamen. Yet this power had been exercised from the commencement of the government as a commercial regulation. All America understood, and had uniformly understood, the word commerce to mean navigation. The Convention must have used the word in that sense, because such was its general acceptance, when the Constitution was adopted.

The universally acknowledged power of the government to impose embargoes showed that all America was united in that construction which comprehended navigation in the word commerce. It had been said in argument that this was a branch of the war-making power, — an instrument of war, and not a regulation of trade. An embargo might undoubtedly be imposed for the purpose of facilitating the equipment of a fleet, or to conceal preparations for an expedition about to sail from a particular port. In these and similar instances it was a military instrument; but an embargo imposed with a single view to commerce was no more a war measure than a merchantman was a ship-of-war because it might be adapted for that purpose.

The avowed object of the embargo which Congress had imposed in the beginning of the century was the protection of commerce and the avoiding war. It was as a commercial measure that it had been opposed on the one side and controverted on the other. Those who denied the constitutionality of the law took the ground, not that Congress could not restrain navigation as a means of regulating commerce, but that a perpetual embargo, a restraint without limit on the right of the merchant to proceed to sea, was the annihilation, and not the regulation, of commerce. It must therefore be regarded as established that the power to regulate navigation was as expressly granted as if that word had been added to the word commerce.

It was also universally admitted that every species of commercial intercourse between the United States and foreign nations was comprehended in the power; and that as it regarded the States the word had the same meaning, although the subject to which the power applied was commerce among the several States. The word "among" meant intermingled with. Commerce among the several States did not stop at the boundary line of each State, but might extend into the interior. It was not intended to say that these words comprehended that commerce which was merely internal, which was carried on between man and man in a State or between different parts of the same State, and which did not extend to or affect other States. The enumeration of the particular

classes of commerce to which the power was to extend indicated that something not enumerated was to be excluded; and this was the exclusive internal commerce of the several States. This construction was consonant with the genius and character of a government intended to apply to matters of general and national interest, and not to those which were merely of a local character.

The completely internal commerce of a State might therefore be considered as reserved for the State itself. But it was equally true that in regulating commerce with foreign nations, the power of Congress did not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations was a benefit in which each and every part of the United States, every district and every county, however far inland, had a right to participate. It was to a great extent carried on through the great rivers which traverse the country in various directions. If Congress had the power to regulate foreign commerce, the power might be exercised wherever that commerce went. A foreign voyage might commence or terminate at a port within a State, and if so, the power of Congress might be exercised within the State.

The principle was, if possible, still more clear when applied to commerce among the several States. If a man residing in one State ordered goods in another, they must be brought from the State where the vendor resided to the residence of the purchaser, and might pass through an intermediate State during the transit. In the regulation of trade with the Indian tribes, the action of the law, especially when the Constitution was adopted, was chiefly within a State.

In regulating commerce, the power of Congress might consequently be exercised within the territorial jurisdiction of the several States. The sense of the nation in this regard appeared unequivocally from the enactments which had, during the recent war with England, provided as a measure of precaution that the transportation of goods between Baltimore and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore, should be inland.

The question where the power might be exercised being thus determined, it remained to inquire what the power was. It was a power to regulate; that is, to prescribe the rule by which commerce was to be governed. This power, like all others vested in Congress, was complete in itself, might be exercised to its utmost extent, and acknowledged no limitations other than those prescribed by the Constitution. If, as had always been understood, the sovereignty of Congress, though limited to specific objects, was plenary as to those objects, the power over commerce with foreign nations and among the several States was vested as absolutely in Congress as if the United States were the only government, and possessed all the powers which were distributed among them and the several States. The restraint which the people held through the exercise of the elective franchise was in this and many other instances arising under the Constitution, the sole restraint on the power of Congress.

It followed from what had been said that the power of Congress comprehended navigation within the limits of every State in the Union, so far as that navigation was in any manner connected with commerce with foreign nations, or among the several States, or with the Indian tribes. It might consequently cross the jurisdictional line of New York, and act upon the very waters from which the State of New York had attempted to exclude the vessels of the appellant.

It had, however, been urged that if the power of Congress went to this extent, still the States might exercise the same power within their respective jurisdictions; that under the principles of the Constitution, and by the express words of the Tenth Amendment, they retained every right which they had not agreed to forego; that an affirmative grant of power would not preclude the grantor, unless the continued exercise of the power by him would be inconsistent with the grant, and that the case before the court was not of that description. These postulates were conceded by the appellant, except the last; as to that, he contended that a power to regulate implied the right to establish a uniform system, and could indeed be designed for no other purpose, and that the gift of

such a power was inconsistent with a right in the grantor to lay down different, and possibly inconsistent, rules.

If the Constitution were consulted, it would appear that the grant of a general power to Congress in some cases was, and in others was not, inconsistent with the exercise of a similar power by the States. It depended on the nature of the power.

The power of the United States to lay and collect taxes was, like the power to regulate commerce, given in general terms, and had never been understood to preclude the exercise of the same power by the States. But the two powers were not alike in their nature, or in the language in which they were conferred. The power of taxation was indispensable to the State governments, and might from its nature reside in and be simultaneously exercised by different authorities over the same thing. Taxation was the simple operation of taking small portions from a constantly accumulating mass, and the power of one government to take what was necessary for certain purposes was not inconsistent with a power in another government to take for other purposes.

Congress might tax, and so might the States, though each exercised the power for objects peculiar to itself, and differing from those intrusted to the other. But when a State proceeded to regulate commerce with foreign nations or among the several States, it was exercising the very power that was possessed by Congress, and doing the very thing which Congress was authorized to do. There was no analogy then between the two instances. In discussing the question, whether the power was still in the States, it was not necessary to inquire whether the power could be exercised by them, where it was not exercised by Congress, because in the case under consideration Congress had exercised the power, and it was by virtue of an authority conferred by them that the appellant claimed the right of passage which his opponents sought to obstruct.

The question therefore was, Could the State of New York restrict commerce by precluding the vessel of the appellant from navigating the waters which Congress had, in the exer-

cise of the power to regulate commerce, licensed it to navigate? In other words, could a State forbid that to be done which Congress had, in the exercise of its undoubted powers, impliedly authorized? — a question which admitted of only one reply.

It had also been contended that if the commercial power had been withdrawn from the States and exclusively conferred on the General Government, they were nevertheless indisputably possessed of other powers, and among them, that of making regulations for the maintenance of order or the prevention of disease, which might be exercised when vessels were in question as well as over other things or persons.

The appellant's reply was, that the word "regulate" implies full power over the thing to be regulated, and necessarily excludes the action of all other powers tending to the same end; and that this is not less true of those portions of the subject over which the power is not exercised, than of those on which it is, because the uniformity which is the object will be as much disturbed by deranging that which the regulating power means to leave untouched as by altering that which it established. There was great force in this argument, and the court was not satisfied that it had been refuted. The question need not be considered, because the case before the court was not only within the scope of the power to regulate commerce, but one as to which Congress had exercised the power of legislation. Whether the law of New York was derived from the undoubted power of the States to establish regulations of police, or from the controverted power to regulate commerce concurrently with the United States, it could not stand when brought into conflict with any rule that the United States had constitutionally enacted. The only construction that could be put on the license that had been taken out by the appellant was an authority to pursue the coasting-trade along the shores and through the bays or rivers of the United States without let or hindrance. The statute by which he was excluded from the waters of New York was consequently in direct contravention

of the permission given by Congress, and must as such be pronounced void.

Whatever doubts may have been felt or expressed in any quarter at the time, few persons would now question the wisdom of this decision. No single act has contributed more to the growth and prosperity of the United States. It would be difficult to estimate the evils that might have ensued if the Court had yielded to the arguments of those who, in obedience to a strict construction of the Constitution, would have suffered the vessels of one State to be shut out by another, or laid under restraints equivalent to exclusion. But for the freedom of intercourse which the Chief-Justice so ably vindicated as essential to commerce, the inhabitants of the various States would hardly have become one people, and been animated by the fraternal spirit which in after years stayed the spread of secession.

We may infer from the foregoing opinion that the power of Congress is co-extensive with the entire field of commerce, including not only traffic, the exchange and sale of commodities, but the intercourse without which traffic would be impracticable. An agreement as to the thing and the price, delivery and payment, are all essential to the completion of the contract of sale. The parties must therefore be able to communicate personally or in some other way; there must be some means of forwarding or transporting the goods; and finally a standard of value, that is to say, money coined or established by law. It follows that vessels, railway-trains, the mail, telegraphy, are subject to the control of Congress;<sup>1</sup> and not only these, but all that is requisite for rendering them efficient, including viaducts and bridges, the improvement of channels and harbors, how vessels shall be constructed, equipped, and manned, the shipment, food, and discipline of the crew, and what shall be requisite to pass the title to ships, the erection and maintenance of beacons, light-houses, and buoys, and presumably as regards interstate and foreign commerce, the rolling-stock of railways, and foreign

<sup>1</sup> *Bridge Co. v. The United States*, 105 U. S. 492; *State Railway Tax*, 15 Wallace, 284.

bills of exchange and bills of lading, not omitting such a regulation of the currency as will give it stability and prevent the fluctuations which hinder trade and render commercial operations hazardous. It does not follow that Congress should take charge of all these subjects: some of them may ordinarily be left to the State legislatures, as better acquainted with the wants of each locality; but they are all seemingly under the control of Congress.

An act regulating commerce is not necessarily invalid because it is at variance with a commercial or other treaty, because treaties, so far as they affect private rights or have a domestic operation, are essentially legislative, and may, like other laws, be abrogated by a statute which lays down a different rule; or, to state the proposition somewhat differently, what the President and Senate do under the treaty-making power, the President, Senate, and House of Representatives may undo by virtue of the law-making power, both powers springing from the same source, the people of the United States, and each standing at the same level, so that neither can claim precedence and whichever speaks last will prevail.

A law violating a treaty may give just cause of complaint to foreign nations, but is none the less binding on the judges; and redress must be sought, not by asking them to disregard the law, but, if the case requires it, by an appeal to arms.<sup>1</sup>

"A treaty," said Miller, J., in the case just cited, "is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do, and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal

<sup>1</sup> Head-money Cases, 112 U. S. 580; *Chew Hong v. The United States* Id. 536, 562; *Taylor v. Morton*, 2 Curtis, 454.

law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declarations that 'this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or the subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it, as it would to a statute.

"But, even in this aspect of the case, there is nothing in this law which makes it irrepealable or unchangeable. The Constitution gives it no superiority over an act of Congress in this respect, which may be repealed or modified by an act of a later date. Nor is there anything in its essential character, or in the branches of the government by which the treaty is made, which gives it this superior sanctity.

"A treaty is made by the President and the Senate. Statutes are made by the President, the Senate, and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect, in the matter of its repeal or modification, than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate. And such is, in fact, the case in a declaration of war, which must be made by Congress, and which, when made, usually suspends or destroys existing treaties between the nations thus at war.

"In short, we are of opinion that, so far as a treaty made by the United States with any foreign country can become the subject of judicial cognizance in the courts of this country,

it is subject to such acts as Congress may pass for its enforcement, modification, or appeal."

We have seen that wherever interstate or foreign commerce extends, the power of the United States goes with it for its protection, and may be exercised within the boundaries of the State when such action is requisite for the attainment of the object.<sup>1</sup> The authority of Congress is consequently not limited to marine navigation, but includes all the waters of the United States through which intercourse takes place among the States and with other nations. The ebb and the flow of the tide, which is the test of navigability in England, and marks the line at which the prerogative of the Crown ceases and private ownership begins, is as much out of place here as it would be if applied to the Rhine, the Danube, the Ganges, or the Nile; and every stream or lake which can be traversed by ships or steamers, and affords a continuous channel for the transportation of goods or passengers from State to State or abroad, is as much within the power to regulate commerce as the sounds, straits, and estuaries which give access to the waters of the sea.<sup>2</sup>

Of the numerous questions which arise as to the rules by which such intercourse should be governed, and the means by which it may be facilitated, some are exclusively under the control of Congress, while others may be decided by the States; but the right to decide in the last resort resides, as it regards all, in Congress, and when they legislate there can be no appeal.

Although the power of Congress is absolute as it regards the means by which mercantile commodities are forwarded, it does not extend to the commodities themselves, or the manner in which they are to be packed for exportation, or the casks or boxes in which they are contained,<sup>3</sup> nor, as it would seem, can Congress regulate the brands or trade-marks

<sup>1</sup> *Ante*, pp. 273, 280.

<sup>2</sup> *The Daniel Ball*, 10 Wallace, 557; *Escanaba v. Chicago*, 107 U. S. 682.

<sup>3</sup> *Nathan v. Louisiana*, 8 Howard, 73; *The United States v. Steffens*, 109 U. S. 82.

by which producers endeavor to designate their wares and prevent fraudulent imitations. The point was considered in *The United States v. Steffens*; <sup>1</sup> but the case went off on another ground, although the inclination of the court was as above stated.

If the power over commerce is geographically co-extensive with the Union, it is studiously limited by the wording of

<sup>1</sup> 100 U. S. 95. Mr. Justice Miller said: "The argument is that the use of a trade-mark — that which alone gives it any value — is to identify a particular class or quality of goods as the manufacture, produce, or property of the person who puts them in the general market for sale; that the sale of the article so distinguished is commerce; that the trade-mark is, therefore, a useful and valuable aid or instrument of commerce, and its regulation by virtue of the clause belongs to Congress, and that the act in question is a lawful exercise of this power.

"Every species of property which is the subject of commerce, or which is used or even essential in commerce, is not brought by this clause within the control of Congress. The barrels and casks, the bottles and boxes in which alone certain articles of commerce are kept for safety, and by which their contents are transferred from the seller to the buyer, do not thereby become subjects of Congressional legislation more than other property (*Nathan v. Louisiana*, 8 Howard, 73). In *Paul v. Virginia* (8 Wallace, 168) this court held that a policy of insurance made by a corporation of one State on property situated in another, was not an article of commerce, and did not come within the purview of the clause we are considering. 'They are not,' says the court, 'commodities to be shipped or forwarded from one State to another, and then put up for sale.' On the other hand, in *Almy v. State of California* (24 Howard, 169) it was held that a stamp duty imposed by the legislature of California on bills of lading for gold and silver transported from any place in that State to another out of the State, was forbidden by the Constitution of the United States because, such instruments being a necessity to the transaction of commerce, the duty was a tax upon exports.

"The question, therefore, whether the trade-mark bears such a relation to commerce in general terms as to bring it within Congressional control, when used or applied to the classes of commerce which fall within that control, is one which, in the present case, we propose to leave undecided. We adopt this course, because when this court is called on in the course of the administration of the law to consider whether an act of Congress, or of any other department of the government, is within the constitutional authority of that department, a due respect for a co-ordinate branch of the government requires that we shall decide that it has transcended its powers only when that is so plain that we cannot avoid the duty."

the grant, to commerce among the States and with foreign nations; and an act of Congress which is so drawn as to include the internal traffic of the States, will be invalid unless the excess can be rejected consistently with the object which the legislature had in view, and it is clear that they would have enacted the residue had they known that the whole could not stand. A law prescribing when demand shall be made and notice given to charge the drawers and indorsers of bills of exchange, would fall within this principle, because Congress have no such power over domestic bills; and the presumption would be that they meant to legislate generally, and would not have laid down a partial rule. So Congress may presumably declare the effect of the indorsement of a bill of lading for goods shipped to other States or sent abroad, but not for such as are deliverable within the State; and an act so worded as to include both classes could not be sustained.

In the *United States v. Steffens*,<sup>1</sup> a statute authorizing the registration of trade-marks and conferring certain privileges on persons who complied with its provisions, was held to transcend the pale of the Constitution. The act could not be upheld by virtue of the eighth clause of the eighth section of article first, because there can be no copyright or patent for a trade-mark, and was equally invalid under the fourth clause of the same section, because the regulation which it established was not in terms or by a necessary implication confined to commerce with foreign nations or among the several States. If such limitation was intended, it was not expressed, and the court could neither give effect to the law as it stood, nor substitute a different law which had not been enacted.

"A glance at the commerce clause of the Constitution," said Mr. Justice Miller, "discloses at once what has been often the subject of comment in this court and out of it, that the power of regulation there conferred on Congress is limited to commerce with foreign nations, commerce among the States, and commerce with the Indian tribes. While bearing

<sup>1</sup> 100 U. S. 82.

in mind the liberal construction, that commerce with foreign nations means commerce between citizens of the United States and citizens and subjects of foreign nations, and commerce among the States means commerce between the individual citizens of different States, there still remains a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same State, is beyond the control of Congress.

“When, therefore, Congress undertake to enact a law which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations; or among the several States, or with the Indian tribes. If not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress.

“We find no recognition of this principle in the chapter on trade-marks in the Revised Statutes. We should naturally look for this in the description of the class of persons who are entitled to register a trade-mark, or in reference to the goods to which it should be applied. If, for instance, the statute described persons engaged in commerce between the different States, and related to the use of trade-marks in such commerce, it would be evident that Congress believed it was acting under the clause of the Constitution which authorizes it to regulate commerce among the States. So if, when the trade-mark has been registered, Congress had protected its use on goods sold by a citizen of one State to another, or by a citizen of a foreign State to a citizen of the United States, it would be seen that Congress was at least intending to exercise the power of regulation conferred by that clause of the Constitution. But no such idea is found or suggested in this statute. Its language is: ‘Any person or firm domiciled in the United States, and any corporation created by the United States, or of any State or

Territory thereof,' or any person residing in a foreign country, which by treaty or convention affords similar privileges to our citizens, may, by registration, obtain protection for his trade-mark. Here is no requirement that such person shall be engaged in the kind of commerce which Congress is authorized to regulate. It is a general declaration that anybody in the United States, or anybody in any other country which permits us to do the like, may, by registering a trade-mark, have it fully protected. So, while the person registering is required to furnish 'a statement of the class of merchandise, and the particular description of the goods comprised in such class, by which the trade-mark has been or is intended to be appropriated,' there is no hint that the goods are to be transported from one State to another, or between the United States and foreign countries. Section 4939 is intended to impose some restriction upon the Commissioner of Patents in the matter of registration; but no limitation is suggested in regard to persons or property engaged in the different classes of commerce mentioned in the Constitution. The remedies provided by the act when the right of the owner of the registered trade-mark is infringed, are not confined to the case of a trade-mark used in foreign or interstate commerce.

"It is therefore manifest that no such distinction is found in the act, but that its broad purpose was to establish a universal system of trade-mark registration for the benefit of all who had already used a trade-mark, or who wished to adopt one in the future, without regard to the character of the trade to which it was to be applied, or the residence of the owner, with the solitary exception that those who resided in foreign countries which extended no such privileges to us were excluded from them here.

"It has been suggested that if Congress has power to regulate trade-marks used in commerce with foreign nations and among the several States, these statutes shall be held valid in that class of cases, if no further. To this there are two objections: *First*, the indictments in these cases do not show that the trade-marks which are wrongfully used were trade-

marks used in that kind of commerce. *Second*, while it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable, so that each can stand alone, it is not within the judicial province to give to the words used by Congress, a narrower meaning than they are manifestly intended to bear, in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body. This precise point was decided in *United States v. Reese*.<sup>1</sup> In that case Congress had passed a statute punishing election officers who should refuse to any person lawfully entitled to do so the right to cast his vote at an election. This court was of opinion that, as regarded the section of the statute then under consideration, Congress could only punish such denial when it was on account of race, color, or previous condition of servitude."

The classification of commerce as internal and among the States, is to a great extent arbitrary, and hinders the effectual exercise of the power even as it regards the latter object. For as uniformity is requisite, and Congress cannot cover the whole ground, the subject is relegated to the several States, which follow different rules; and a contract may depend for its effect on whether it is to be performed on the right or left bank of the Mississippi, or be variously interpreted in Jersey City and Brooklyn, although both are suburbs of New York. Nor is this all; the State and national tribunals have no common standard, and questions of much moment—as, for instance, whether the transfer of a bill of exchange or promissory note as a collateral security constitutes a negotiation for value, or the effect of an insurance against fire—may be differently answered by a State and Federal tribunal sitting in the same locality and professing to administer the same laws.<sup>2</sup>

<sup>1</sup> 92 U. S. 214.

<sup>2</sup> *Swift v. Tyson*, 16 Peters, 1; *Carpenter v. The Prov. Ins. Co.*, Id. 495; *Watson v. Tarpley*, 18 Howard, 517; *Oates v. The National Bank*, 100 U. S. 245; 2 *American Leading Cases* (5 ed.), 226, 229; 2 *Leading Cases in Equity* (4 Am. ed.), 83.

In *Oates v. The National Bank*,<sup>1</sup> the rule was said to be that "while the Federal courts must regard the laws of the several States, and their construction by the State courts (except where the Constitution, treaties, or statutes of the United States otherwise provide), as rules of decision in trials at common law in the courts of the United States, in cases where applicable, they are not bound by the decisions of those courts upon questions of general commercial law. Such is the established doctrine of this court, so frequently announced that we need only refer to a few of the leading cases bearing upon the subject."<sup>2</sup>

It was held to follow that in determining whether the transfer of a promissory note in Alabama as security for an antecedent debt and in consideration of an agreement for forbearance freed the note from equities, the Supreme Court would be governed, not by the decisions in that State, but by their own conception of the doctrines of the mercantile law. So in *The Railroad Co. v. The National Bank*,<sup>3</sup> the plaintiff was held to be a holder for value, although he had taken the note in suit merely as a collateral for a pre-existing obligation and was, agreeably to the authorities in New York, whence the question came, liable to antecedent equities.<sup>4</sup> Such a result is the more anomalous because the federal courts are confessedly bound by the legislative acts of the States as regards their purely internal commerce and all contracts that are not commercial; and the long-continued acquiescence of the New York legislature in the rule laid down by Chancellor Kent in *Bay v. Coddington* was a tacit ratification which rendered it not less obligatory than a statute.

In considering these judgments it must be remembered

<sup>1</sup> 100 U. S. 246.

<sup>2</sup> *Swift v. Tyson*, 16 Peters, 1; *Carpenter v. The Prov. Ins. Co.*, Id. 495; *Watson v. Tarpley*, 18 Howard, 517; see *The Railroad Co. v. Lockwood*, 17 Wallace, 357, 368; *Myrick v. The Michigan Central R. R. Co.*, 107 U. S. 102; *Burgess v. Seligman*, 107 Id. 20.

<sup>3</sup> 102 U. S.

<sup>4</sup> *Bay v. Coddington*, 5 Johnson's Ch. 54; 20 Johnson, 637; *Rosa v. Brotherson*, 10 Wend. 86; *M'Bride v. The Farmers' Bank*, 2 N. Y. 450, 454.

that, agréably to the view taken by the same tribunal, the decision of a court of last resort is not only conclusive on the parties, but gives the rule for other transactions of a like kind, and is in effect a law within the meaning of the clause forbidding the States to impair the obligation of contracts.<sup>1</sup> This doctrine has hitherto been confined to the interpretation of statutes, but is obviously not less applicable to rules laid down judicially, where none have been prescribed by the legislature. Such rules, when acquiesced in by the community and tacitly ratified by the legislature, are as much laws as if they were formally enacted. The various courts of last resort have consequently, under our system, a legislative function which is not less real than that of Parliament or Congress, and a large part of American and English jurisprudence consists of doctrines which have been evolved in the administration of justice, and enunciated by the judges, and have become binding through the general assent which gives custom the force of law. No method can be more beneficial; but it should not be so used as to transcend the limits set to the government as a whole, or carry the law-making power of the judicial branch beyond that which can be constitutionally exercised by the legislature.

The Supreme Court of the United States may well lay down rules as to points arising under the Constitution, but they cannot constitutionally overrule the State courts as to matters which are exclusively reserved to the States. Were Congress to regulate the transfer of promissory notes, the act would be confessedly invalid; and if the judgment of the Supreme Court as to what constitutes a negotiation for value is binding on the subordinate Federal tribunals, it is because they may be compelled to obey by a writ of error. No such compulsion can be applied to the State tribunals as regards the administration of commercial law; and the decisions of the Supreme Court, so far as that is concerned, have no greater authority than those of the Queen's Bench or Exchequer. The doctrine of *Oates v. The National Bank* is therefore objectionable, not only as an assumption of power

<sup>1</sup> *Thompson v. Perrine*, 103 U. S. 817.

over the internal commerce of the States not warranted by the Constitution, but in bringing the Circuit and District Courts of the United States into discord with the State tribunals, which cannot depart from the principles which they have enunciated. Such a course tends to produce a conflict of laws among tribunals sitting in the same locality, and brings the administration of justice into disrepute, by making the result of causes depend on the forum where they are instituted.<sup>1</sup>

<sup>1</sup> Whether a suit shall be won or lost consequently turns on which side of the street it is brought, and a plaintiff may, by taking a nonsuit after the presiding judge has charged the jury adversely, and crossing the street, obtain the judgment which would have been given against him had he remained. See *The Manhattan Ins. Co. v. Broughton*, 109 U. S. 121; *The Railroad Co. v. The National Bank*, 2 Id. 29; *McBride v. The Farmers' Bank*, 26 N. Y. 450, 454; *Brooke v. The New York & Lake Erie R. R. Co.*, 108 Penn. 539; *Petrie v. Clark*, 11 S. & R. 377; *Goodman v. Simonds*, 20 Howard, 343, 370; 2 *Leading Cases in Equity*, 83, 86 (4 Am. ed.); 2 *American Leading Cases*, 222 (5 ed.). The case of *The Railroad Co. v. The National Bank*, 102 U. S. 14, is a striking instance of an anomaly which, so far as I am aware, is unprecedented. A note made by a railroad company and indorsed by its officers with the view of raising money, was placed in the hands of a note-broker for sale. He pledged it as security for a pre-existing debt to a National Bank. Suit having been brought by the bank against the indorsers in the Supreme Court of New York, it was held that the note was not negotiated for value, and that the bank could only recover \$601 which the railroad company owed the broker. This amount was paid and the judgment satisfied; and the bank then instituted proceedings in the same city against the railroad company in the Circuit Court of the United States. It was argued for the defence that as the principle had been determined by the Supreme Court of New York in an action on the same instrument and between the same parties, or persons who were in privity with them, it was *res adjudicata*, and moreover that since the note was made and negotiated in New York, it should be governed by the law of that State as defined by an unbroken chain of decisions reaching through more than fifty years. This contention was overruled in the Circuit Court and by the Supreme Court of the United States, which held that in their opinion, and agreeably to the English authorities; the transfer was for value, and the decision of the New York courts must be disregarded. Although one of the reasons assigned for this conclusion was that the commercial law should be uniform throughout the country, the effect was the reverse, —to produce a conflict of laws in New York, Pennsylvania, Ohio, and the other States, where the courts adhere

The question, What the power to regulate commerce includes, is, as we have seen, complicated with another, How far does it extend? and both were considered with rare ability in *Gibbons v. Ogden*. The argument that, as the desire to prevent conflict, and promote the certainty and uniformity which are not ordinarily found where there are two masters, was the chief motive for conferring the power to regulate commerce, the authority of Congress must be exclusive, is, as Chief-Justice Marshall intimated, cogent, and would be incontrovertible if the various operations of commerce were, like the wheels of a watch, so closely related that one could not be touched without affecting all. It would be absurd and repugnant to conceive of two different intelligences as adjusting the works of a chronometer or governing the movements of the solar system. If, however, the power itself is, as the

to the doctrine of *Bay v. Coddington*, and cannot consistently shift their ground in obedience to the dictates of a co-ordinate tribunal which according to the theory of the Constitution should follow them in all that relates to non-commercial contracts and internal commerce. *M'Bride v. The Farmers' Bank*, 26 N. Y. 450, 554; *Roxborough v. Messick*, 6 Ohio St. 455, 457; *Brooke v. The New York & Erie R. R. Co.*, 108 Penn. 539. The law may well change with a change of place, because the needs of different localities are not necessarily the same; but discordant rules in the same locality tend to moral as well as legal disorder, by giving astute practitioners an advantage over their more scrupulous brethren and enabling designing men to make contracts which are understood in one sense and interpreted in another. I may add that the effect of a bare transfer of a note as collateral security for an antecedent debt came before the Supreme Court of the United States for the first time in *The Railroad Co. v. The National Bank*, because in all the previous instances the note was taken in payment or with an express or implied agreement for forbearance; there was therefore the less reason for subverting the law of New York by a judicial edict which affected the internal commerce of the State, and would have been void if made by Congress. *Goodman v. Simonds*, 20 Howard, 343, 370. As Swan, J., observed in *Roxborough v. Messick*, 6 Ohio St. 455, 457, "All that is said in *Blanchard v. Stephins*, 3 Cushing, 168, and *Porrier v. Morris*, 2 E. & Bl. 89, in regard to the rule to be adopted when negotiable paper is taken as collateral security for a precedent debt is *obiter* and does not sanction the idea that the creditor receiving such collateral must be treated as a holder for value where there is no agreement to wait on the prior debt or forego any other right."

Chief-Justice declared, a unit, the subject over which it extends consists of distinct and several parts; and while the common good, which is the peculiar object of the government of the United States, requires that some of these should obey a uniform rule, others may conveniently be regulated with a view to local needs and circumstances.<sup>1</sup>

If a chief-justice of the United States should not be a politician, in the unworthy sense in which the term is used in the United States, he should still in an eminent degree possess the broad and comprehensive outlook of a statesman; and Marshall was not less fortunate in this than in the other requirements of his office. He accordingly refrained from following the deduction of *Mr. Webster* to its logical result, and limited himself to the irrefragable proposition that the power to regulate commerce includes that of establishing rules for navigation, and that when Congress have in the exercise of this power laid down such a rule, a contrary or inconsistent rule founded on State authority will be invalid. This was the point actually determined in *Gibbons v. Ogden*,<sup>2</sup> and is the only one for which it can be authoritatively cited.

We may therefore infer that the existence of the power in Congress to regulate commerce, does not necessarily preclude the exercise of the same power by a State on points which Congress have left untouched.<sup>3</sup> Accordingly, Congress, as far back as 1798, declared that the existing State laws with reference to pilots, and such laws as the States might enact on the same subject, should be valid until further provision was made by Congress. It has justly been remarked that this act virtually recognizes the right of a State to legislate with reference to matters which, though concerning commerce, depend on local considerations, so long as the General Government refrains from legislating; because if the inten-

<sup>1</sup> *Gilman v. Philadelphia*, 3 Wallace, 713, 727.

<sup>2</sup> 9 Wheaton, 1; *Morgan v. Louisiana*, 118 U. S. 455, 465; *Packet Co. v. Catlettsburg*, 105 Id. 559, 562.

<sup>3</sup> *Escanaba v. Chicago*, 107 U. S. 687; *Mobile v. Kimball*, 102 Id. 691; *Gilman v. Philadelphia*, 3 Wallace, 713, 727.

tion of the Constitution was to take the whole and every part of the commercial power from the States and vest it exclusively in the national government, Congress could not authorize the States to do what the Constitution had impliedly forbidden, and because if Congress can legitimate an invalid State law by adopting it, — which seems questionable, — they cannot adopt laws that have not been enacted, and which exist only in anticipation. Such a course would be a virtual abdication in favor of the States, unauthorized by the Constitution, and contrary to its manifest intent.

The point arose in *Cooly v. The Port Wardens of Philadelphia*,<sup>1</sup> and was decided favorably to the States, Curtis, J., saying that if pilot laws were regulations of commerce, still the power to regulate commerce operated on different subjects, some of which required a uniform rule, while others might properly be governed by rules varying with the locality; that with regard to the latter class, if Congress did not occupy the field of legislation, it remained open to the States, and in the case before the court, Congress had expressly left the way clear for State legislation; that the question whether the approach to a harbor was such as to require a pilot, might more properly than most others be left to a local legislature having direct and accurate means of information. The case was one where the safe and successful prosecution of trade would be endangered if the States could not act in the absence of national legislation. The question turns, agreeably to this decision, on whether the subject-matter admits of local regulation, or requires a general and uniform system. Where uniformity is essential, the rule must be prescribed by Congress; but the case is obviously different where the law should be moulded to suit the varying needs and circumstances of each locality.<sup>2</sup> The lights which vessels must carry, what signals they should display, how emigrants should be fed while on board, and all that relates to the shipping and control of seamen, depend on considerations

<sup>1</sup> 12 Howard, 299.

<sup>2</sup> *Escanaba v. Chicago*, 107 U. S. 687; *Gilman v. Philadelphia*, 3 Wallace, 713.

which are presumably the same whether the voyage terminates at New Orleans or New York, and ought to be governed by some general rule which can only be laid down by Congress. What, if any, means shall be adopted to improve the navigation of a bay or river, and whether vessels shall be required to take a pilot in entering or leaving a port, are questions, on the other hand, which, so long as Congress does not think fit to legislate, may properly be determined by the local legislatures.<sup>1</sup>

Pilotage is, nevertheless, like every other incident to navigation, subject to the control of Congress; and if they legislate, a State law which is at variance with the rule so prescribed, will be suspended so long as the act of Congress is in force.<sup>2</sup> For like reasons, a town or city may prescribe at what points within its limits vessels shall be moored for the purpose of landing or receiving freight and cargoes, and such an ordinance will not be set aside unless it is manifestly unreasonable, or fetters interstate or foreign commerce.<sup>3</sup>

In the Passenger Cases,<sup>4</sup> a State law authorizing the Health Officers of New York to demand and recover a certain sum from the master of every vessel arriving at that port for each steerage passenger, to be applied to the construction and support of a marine hospital, was held to be in the former class and invalid as a regulation of commerce at variance with the power vested in Congress. A majority of the judges were also of opinion that the importation of passengers is a commercial function exclusively under the control of Congress, which the States can neither tax nor make the subject of police regulations.

So an act of assembly requiring the cargoes of sea-going vessels to be surveyed immediately after their arrival, and a list prepared of all goods on board that have been damaged

<sup>1</sup> Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 204; Morgan v. Louisiana, 118 Id. 455, 465.

<sup>2</sup> Sprague v. Thompson, 118 U. S. 90.

<sup>3</sup> Packet Co. v. Catlettsburg, 105 U. S. 559; Morgan v. Louisiana, 118 Id. 455, 465.

<sup>4</sup> 7 Howard, 283.

during the voyage, not as a measure of police or sanitary precaution, but to furnish official evidence to the parties interested, and, where the goods are perishable, as a preliminary step towards an order of sale, is a regulation of commerce which cannot be enforced consistently with the Constitution of the United States.<sup>1</sup>

The question is the more complicated because, as Marshall, C.-J., said in *Gibbons v. Ogden*, "there is an immense mass of legislation which embraces everything within the territory of a State not surrendered to the General Government, which can be most advantageously exercised by the States themselves, — inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State; and those which respect turnpike-roads and ferries are component parts of the mass. . . . No direct power over these objects is granted to Congress, and consequently they remain subject to State legislation."<sup>2</sup> Bridges may be added to the above list, as being, like ferries, the connecting links of highways and essential to their usefulness.<sup>3</sup>

There are, as these remarks indicate, numerous instances where powers which belong to this class and are essential to the welfare of society — as, for instance, the power to tax, to regulate internal traffic, to preserve health and maintain order — cannot be exercised without affecting commerce among the States and with foreign nations, but where the States may nevertheless adopt such measures as are requisite, even where these are not distinguishable from measures that might as appropriately be employed for the regulation of commerce.<sup>4</sup>

As Chief-Justice Marshall remarked in *Gibbons v. Ogden*, "the use of like means to carry distinct powers into effect

<sup>1</sup> *Foster v. New Orleans*, 94 U. S. 246.

<sup>2</sup> *Gibbons v. Ogden*, 9 Wheaton, 1; *Gilman v. Philadelphia*, 3 Wallace, 713, 722.

<sup>3</sup> *Gilman v. Philadelphia*, 3 Wallace, 713, 726; *Cardwell v. The Bridge Co.*, 113 U. S. 205, 208; *The People v. The Saratoga R. R. Co.*, 15 Wend. 113, 133.

<sup>4</sup> *Gilman v. Philadelphia*, 3 Wallace, 713, 726, 730; *Morgan v. Louisiana*, 118 U. S. 455, 465.

will not render the powers identical, and an enumerated power may be exercised through any appropriate means, although the same means would be equally appropriate to some other power that has been withheld ;” and although this was said of the powers conferred on the General Government, it is not less true of those reserved to the States.

A ship is an instrument of commerce, and therefore subject to regulation by Congress. But it may also be indirectly a means of introducing an infectious disease, and may, as such, come within the operation of the health laws or sanitary regulations of a State. It is also possible to conceive of it as a scene of riot and debauchery, or as a place of resort or concealment for persons of desperate and abandoned character, and as such it may properly be subjected to the supervision of the police. And the rules established for these purposes will not be invalid because they incidentally conduce to the regulation of commerce, or might have been appropriately used for that object by Congress.<sup>1</sup>

In *Morgan v. Louisiana* a State law providing that any vessel ascending the Mississippi should on arriving at the quarantine station below New Orleans be inspected by the resident physician and receive a certificate of her sanitary condition, and should thereafter pay a fee, varying with her size and rig, which should be used for defraying quarantine expenses, was sustained, as falling within the above principles. The sum so exacted was not, in the opinion of the court, a tax in the proper sense of the term, nor was it a regulation of commerce, although it might incidentally affect commerce ; it was a fee or compensation for a necessary and proper use of the police power which is inherent in the States and may be exercised by them, unless it conflicts with some constitutional act of Congress. A State may accordingly, as this decision indicates, establish a quarantine for vessels arriving from abroad, and forbid the passengers and crew to land until their sanitary condition has been ascertained by inspection, or may require the master of the ship to report the names, age, and last place of abode or residence of the persons on board, under

<sup>1</sup> *Morgan v. Louisiana*, 118 U. S. 455, 464.

penalty of fine and imprisonment. The latter point was adjudged in the City of New York *v. Miln*,<sup>1</sup> by a divided court, on the ground that if the rule in question might have been established as a means of regulating commerce, it was not less an appropriate measure of police, and consequently within the jurisdiction of the State.

The same principle was applied in the License Cases<sup>2</sup> which arose under laws passed by Massachusetts, New Hampshire, and Rhode Island, forbidding the sale of spirituous liquors in less quantities than twenty-eight gallons without a license from the State. In one of these cases the sale was of French brandy purchased by the defendant from the original importer in a sister State; in another of them the defendant had been fined for selling a barrel of gin in New Hampshire which he had bought in Boston, and carried by sea to Portsmouth in a vessel licensed by the United States. The law was held valid in both instances as a sanitary regulation or police measure which did not conflict with any statute passed by Congress. Chief-Justice Taney said that goods which have been sold by the importer cease to be a part of foreign commerce and pass under the dominion of the State, and that the statutes passed by Congress under the power to regulate commerce among the States only concern the vessel, and do not include the cargo.

It is established, in conformity to the above principles, that a State may legislate as regards persons and things within her jurisdiction, although the statute operates indirectly on foreign or interstate commerce, unless Congress has laid down some rule with which the measure adopted by the State would clash;<sup>3</sup> and an act prescribing the charges of warehouses may consequently be valid, although they are used for the unloading, storage, and shipment of goods on the way to other States or countries; and the regulation incidentally affects interstate or foreign commerce.<sup>4</sup>

A State law giving the right to compensation for deaths caused by negligence may in like manner be enforced by the

<sup>1</sup> 11 Peters, 102.

<sup>2</sup> 5 Howard, 504.

<sup>3</sup> *Gilman v. Philadelphia*, 3 Wallace, 713, 730.

<sup>4</sup> *Munn v. Illinois*, 94 U. S. 114.

representatives of the deceased, although he was at the time of the accident on board a vessel plying between different States and on a navigable river subject to the control of Congress.<sup>1</sup> So a law regulating warehouses is not invalid because they are used as places of deposit or safe keeping for goods which form a part of the sum of interstate commerce, and are on their way to a sister State.<sup>2</sup> And as the purely internal commerce of a State is not within the power of Congress, the legislature may regulate the rates for freight or passage from one part of the State to another, although the cost of carriage through or into the State is thereby enhanced or lessened.<sup>3</sup> But contracts for the transportation of goods or passengers from one point in the United States to another, are under the control of Congress, unless both points lie within a State; and if they do not, any State legislation which affects the transit as a whole, or precludes the carrier and the forwarder from agreeing on such rates for freight or passage as they think proper, will be invalid, although it relates in terms to so much only of the voyage or journey as passes through the State and might, were that all, be governed by her laws.<sup>4</sup> Such a transit is a unit and national, and a State cannot by treating the part within her lines as several, acquire jurisdiction over the whole.

The power to open and construct highways stands on like grounds with the police power, as being necessarily and under ordinary circumstances vested in the States, and carrying with it the right to do all that is requisite for its effectual exercise. Although bridges over navigable rivers may incidentally impede navigation, they are still the connecting links without which highways cannot be, in the full sense of the term, thoroughfares; and the local authorities can better judge of their necessity and direct the manner in which they shall be built and regulated than can the Gen-

<sup>1</sup> *Sherlock v. Alling*, 93 U. S. 99; *The Harrisburgh*, 119 Id. 199.

<sup>2</sup> *Munn v. Illinois*, 94 U. S. 113.

<sup>3</sup> *Peik v. The Chicago R. R. Co.*, 94 U. S. 164; *The Chicago R. R. Co. v. Quincy R. R.*, Id. 155.

<sup>4</sup> *Wabash R. R. Co. v. Illinois*, 118 U. S. 557; *ante*, p. 430.

eral Government, which has neither time nor opportunity for such details. It is therefore eminently a case where centralization would be injurious, and the initiative should be left to the States; especially as Congress may require the structure to be altered or removed if it proves injurious to navigation.<sup>1</sup> Ferries stand in the same category as bridges, as affording a means of passage across rivers and intended to surmount the obstacle which they present, and are consequently subject to State legislation, even when they afford the means of communication between different States, and although the boat or vessel is enrolled and registered, and has been inspected under the acts of Congress.<sup>2</sup> As was declared in *Conway v. Taylor*, the authority to establish and regulate ferries is not included in the power of the Federal Government to regulate commerce with foreign nations and among the several States and with the Indian tribes, has always been exercised by the States, and is undoubtedly a part of the immense mass of undelegated powers reserved to the States respectively.

In *Chilvers v. The People* a ferry was accurately defined as a public highway or thoroughfare across a stream of water by boat instead of by bridge; and it was held that the fee exacted by a State or city for the grant of such a privilege is but the price paid for the grant of a franchise or public right conferred on an individual.

Ferries across a river or channel which divides two or more States are nevertheless a means of interstate commerce which may be regulated by Congress, and cannot be subjected to any State tax or regulation that will operate as a charge or restriction on the intercourse among the States, which, agreeably to the Constitution, must be untrammelled by any laws that are not imposed by Congress.<sup>3</sup> But they

<sup>1</sup> *Escanaba v. Chicago*, 107 U. S. 687; *Gilman v. Philadelphia*, 3 Wallace, 713.

<sup>2</sup> *Conway v. Taylor's Ex.*, 1 Black, 603; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 214; *Fanning v. Gregoire*, 16 Howard, 524; *Wiggins v. St. Louis*, 102 Ill. 560; *Chilvers v. The People*, 11 Mich. 43.

<sup>3</sup> *St. Louis v. The Ferry Co.*, 11 Wallace, 432; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 216.

are none the less subject to the police power of the States and to such reasonable charges as will repay the cost incident to carrying it into effect.<sup>1</sup>

Rivers are a means alike of internal, interstate, and foreign commerce, and may consequently be regulated both by the States and by the General Government,—subject, nevertheless, to the general principle that a State may not adopt any course which is at variance with the laws made by Congress, or that will injuriously affect trade with her sister States or foreign nations.<sup>2</sup> It follows that while the United States may improve the navigation of a bay or river by removing bars or shoals, or turning the whole force of the current into a single channel, the right is not exclusive, and may be exercised concurrently by the State.<sup>3</sup> It was accordingly held in the case last cited that the State of Alabama might tax the city of Mobile for the improvement of the bay or harbor on which it is situated, although the effect was to charge the city with the entire expense of an improvement in which the whole State was interested. The improvement of harbors and bays, and of the navigable rivers flowing into them, is within the power of Congress over commerce; but so long as Congress does not see fit to act, the way is open to the States.

“The objection that the law of the State, in authorizing the improvement of the harbor of Mobile, trenches upon the commercial power of Congress, assumes an exclusion of State authority from all subjects in relation to which that power may be exercised, not warranted by the adjudications of this court, notwithstanding the strong expressions used by some of its judges. That power is indeed without limitation. It authorizes Congress to prescribe the conditions upon which commerce in all its forms shall be conducted between our citizens and the citizens or subjects of other countries, and between the citizens of the several States, and to adopt

<sup>1</sup> *The Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 216.

<sup>2</sup> *The People v. The Saratoga R. R. Co.*, 15 Wend. 113, 132.

<sup>3</sup> *South Carolina v. Georgia*, 93 U. S. 4; *The County of Mobile v. Kimball*, 102 U. S. 696.

measures to promote its growth and insure its safety. And as commerce embraces navigation, the improvement of harbors and bays along our coast, and of navigable rivers within the States connecting with them, falls within the power. The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries, or between the States, which consists in the transportation, purchase, sale, and exchange of commodities. Here there can of necessity be only one system or plan of regulation, and that Congress alone can prescribe. Its non-action in such cases with respect to any particular commodity or mode of transportation, is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free: There would otherwise be no security against conflicting regulations of different States, each discriminating in favor of its own products and citizens, and against the products and citizens of other States. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the States, was to insure uniformity of regulation against conflicting and discriminating State legislation.

“Of the class of subjects local in their nature, or intended as mere aids to commerce, which are best provided for by special regulations, may be mentioned harbor pilotage, buoys, and beacons to guide mariners to the proper channel in which to direct their vessels.

“The improvement of harbors, bays, and navigable rivers within the States falls within this last category of cases. The control of Congress over them is to insure freedom in their navigation, so far as that is essential to the exercise of

its commercial power. Such freedom is not encroached upon by the removal of obstructions to their navigability or by other legitimate improvement. The States have as full control over their purely internal commerce as Congress has over commerce among the several States and with foreign nations; and to promote the growth of that internal commerce and insure its safety they have an undoubted right to remove obstructions from their harbors and rivers, deepen their channels, and improve them generally, if they do not impair their free navigation as permitted under the laws of the United States, or defeat any system for the improvement of their navigation provided by the General Government. Legislation for the purposes and within the limits mentioned does not infringe upon the commercial power of Congress, and so we hold that the act of the State of Alabama of Feb. 16, 1867, to provide for the improvement of the river, bay, and harbor of Mobile, is not invalid."<sup>1</sup>

It has been decided on like grounds that Massachusetts may well enact that lumber driven or floated down the Connecticut River shall be formed into rafts and be in the charge of some competent person while passing through her borders, although the Connecticut flows through several States, and the lumber in question comes from Vermont, and is on its way to the sea.<sup>2</sup>

The right to impose such duties as are absolutely necessary for their inspection-laws is reserved to the States by the Constitution, and a State may consequently provide that her products shall be examined as to quantity, quality, and weight before exportation, to insure excellence, or as a guaranty against fraud;<sup>3</sup> but the authority thus conferred does not include passengers, or warrant an enactment that they shall be inspected before landing, and a fee paid to the officer by whom the duty is performed.<sup>4</sup>

Although corporations are artificial persons and not within

<sup>1</sup> The County of Mobile v. Kimball, 102 U. S. 696.

<sup>2</sup> Harrigan v. The Connecticut River Lumber Co., 129 Mass. 589.

<sup>3</sup> Turner v. Maryland, 107 U. S. 38; Gibbons v. Ogden, 9 Wheaton, 1.

<sup>4</sup> The People v. Compagnie Générale, 107 U. S. 59.

the clause "that the citizens of each State shall enjoy the rights, privileges, and immunities of the citizens of the several States," and a State may prescribe the terms on which companies chartered by other States shall transact business within her limits,<sup>1</sup> it cannot debar them from entering into contracts for the prosecution of the interstate or foreign commerce which is equally entitled to protection and beyond State control, whether it is carried on by individuals or bodies corporate.<sup>2</sup>

<sup>1</sup> *Paul v. Virginia*, 8 Wallace, 168; *ante*, p. 276, *post*, p. 476.

<sup>2</sup> *Cooper Manuf. Co. v. Ferguson*, 113 U. S. 727; *Ferry Co. v. Pennsylvania*, 114 U. S. 196.

## LECTURE XXII.

Regulation of Commerce (*continued*). — Relation of State Taxation to the Regulation of Commerce. — State Police Power. — Products of other States. — Immigration. — Interstate Commerce. — States may not so regulate Internal as to affect interstate Transportation of Freight or Passengers. — Short and Long Haul. — Policies of Insurance. — Bills of Exchange. — Bills of Lading. — Corporations chartered by other States.

TAXATION and the power to regulate commerce are so far coincident that both operate on the same things, and may tend to one result. Commerce may obviously be regulated through a tax, or a tax incidentally affect commerce; as where duties are laid on foreign or colonial ships or products with a view to favoring domestic trade or navigation. Such was the selfish course which led to the Declaration of Independence, but which England has now exchanged for the wise and liberal rule which holds Canada, Australia, and New Zealand without the aid of force. The power to tax and the power over commerce are nevertheless diverse, and may be lodged in different branches of the same government, or even in distinct governments ruling the same territory, without being necessarily repugnant or inconsistent. The subject was the theme of earnest debate during the controversy which preceded the American Revolution. The Colonists conceded that the mother-country might levy such duties as were appropriate to the regulation of commerce, but declared that taxation was inseparable from representation, and that a people who sent no delegates to Parliament were entitled to tax themselves. The distinction was declared by Chat-ham to be inherent in the nature of things, and one which every nation that cared for freedom should religiously observe. Property was private, individual, absolute; trade, a vast and

complicated machine, reaching as far as ships could sail or waters flow. To regulate its several parts and movements, and combine them for the good of the whole, required the superintending wisdom and energy of the supreme power in the empire.

But this supreme power stood in no such relation towards the internal taxation which bore directly on property; there was no warrant in the Constitution for a supreme power operative on property. Let the distinction then remain forever ascertained, — the right of taxation was in the Colonies; Parliament must regulate commerce.<sup>1</sup>

The distinction drawn by Chatham with so much clearness is applicable at the present day, and shows that there is no necessary conflict between the power of the General Government to regulate commerce, and the power of the States to tax the railroads, canals, ships, locomotives, and ferry-boats which are the instruments of commerce, or the goods and wares in which the merchant deals.<sup>2</sup>

In the Head-money Cases<sup>3</sup> the court held, on grounds analogous to those taken by Chatham, that an impost which might be unconstitutional if considered simply as such, from want of uniformity or other cause, may yet be valid as a regulation of commerce. The point arose on an act imposing a duty "of fifty cents for each and every passenger, not a citizen of the United States, who shall come by steam or sail vessel from a foreign port to any point in the United States;" and it was decided that the transportation of passengers from abroad is a part of our commerce with foreign nations, and laws regulating it are within the commercial power of Congress. It is because such laws directly affect commerce that they cannot be made by the States, and it follows that they may well be enacted by the General Government.

<sup>1</sup> Chatham's Speech in the House of Lords, January, 1775; Thackeray's Life of Chatham, ii. 281.

<sup>2</sup> Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365; Memphis & Little Rock Co. v. Nolan, 14 Fed. Rep. 532; House v. Glover, 15 Id. 292; Marshalltown v. Blum, 58 Iowa, 184; *In re* Watson, 15 Fed. Rep. 511; State v. The Pullman Car Co., 16 Fed. Rep. 193.

<sup>3</sup> 112 U. S. 580.

The difficulty of drawing the line between governments which, like the States and the United States, operate on the same persons and things, is extreme, and affected by considerations that cannot easily be reduced to general rules. According to the principle laid down in the "Federalist," and authoritatively recognized by the Supreme Court of the United States, the States may exercise a concurrent or independent power in all cases but three. *First*, where the power is lodged exclusively in the Federal Constitution. *Second*, where it is given to the United States and prohibited to the States. *Third*, where from the nature and objects of the power it must necessarily be exercised by the national government exclusively.<sup>1</sup> We may add a fourth, where power is constitutionally exercised by the United States, and the exercise of a like or different power would be inconsistent with the rule prescribed or course adopted by the General Government.

The burden of proof is, as these canons indicate, on him who contests the authority of a State; and he must point to some article of the Constitution by which the power in question is forbidden to the States, or delegated in terms or by a necessary implication exclusively to the United States. It is on this basis that the Constitution was presented to and accepted by the people, and it is on this alone that the dual nature of the system can be maintained, and the centralization avoided which would leave the fabric without buttresses, and end in its downfall. There is consequently a broad neutral ground open to the States and the General Government, where either may act with beneficial results that could not be attained if the other were excluded. No subject is more distinctly intrusted to the care of Congress than the importation of foreign goods, and there is none where the intention to exclude the States is more clearly written; and yet a State may, in the exercise of its police power, forbid spirituous liquors imported from abroad to be sold by retail, or to be

<sup>1</sup> The Federalist, No. 32; *Houston v. Moore*, 5 Wheaton, 49; *Gilman v. Philadelphia*, 3 Wallace, 713, 730.

sold at all without a license, and visit the violation of the prohibition with such punishment as it deems proper.<sup>1</sup>

So a vessel registered, or enrolled, or licensed under the acts of Congress, may not only be stopped under the quarantine laws of a State before reaching her port of destination, or carried elsewhere after her arrival and detained for an indefinite period, but the cargo may, if infected, be taken from the hold, and "if it cannot be purged of its poison, be committed to the flames," although the effect is to preclude the collection of duties that would otherwise accrue to the United States.<sup>2</sup> Such an exercise of authority may seem to be inconsistent with the authority of the General Government; but it does not necessarily involve collision, and no evil has hitherto ensued. Both powers — that of Congress to regulate importation, and that of the States to see that it does not become a source of disease — have worked harmoniously, without detriment to the public good; and the remark is not less true of the power of the States to construct bridges over navigable streams, and to enact bankrupt and insolvent laws.

There is the more reason for suffering the States to exercise the powers which were originally theirs, and that have not been exclusively delegated to the General Government, because Congress, within the scope of their powers, and as it regards the ends for which the General Government was established, have a veto which is in effect absolute, and may supersede State legislation by enacting a statute covering the same ground. If the possibility that a power may be abused can be adduced in any case to prove that it does not exist, the argument is unsound when there is a controlling hand which may intervene to correct errors and rectify mistakes. The case is therefore eminently one where the judicial branch of the government should await the action of the legislative.<sup>3</sup>

It is at the same time equally well settled that the powers of the States may not be so exercised as to conflict with the

<sup>1</sup> The License Cases, 5 Howard, 504; *Gilman v. Philadelphia*, 3 Wallace, 713, 730.

<sup>2</sup> *Gilman v. Philadelphia*, 3 Wallace, 713, 731; *Robbins v. Shelby District*, 120 U. S. 489, 493.

<sup>3</sup> *Ibid.*

powers of Congress, or frustrate any purpose which the General Government is legitimately endeavoring to carry into effect. The objection in such cases is not to the means employed, but to the manner of using them and the result which they are calculated to produce. The principle has been applied in various forms, and sets a limit to all the powers of the States, whether shared with the United States or exclusively their own.<sup>1</sup>

A State, as we have seen, has an inherent power of taxation, by virtue of its sovereignty, without which it could not procure the requisite funds for the performance of its functions, and that may in general be exercised over every person, thing, or business within its boundaries. A customary and legitimate means of taxing is to enact that persons who are desirous of entering into business as brokers or auctioneers on their own behalf, shall procure and pay for a license. An act providing that goods which have been brought from another State or foreign countries shall not be sold by the importer without such a license, will nevertheless be invalid as being indirectly a tax on imports contrary to the constitutional prohibition, and imposing a burden on external commerce which the Constitution intends shall be free from any restraint not laid by Congress.<sup>2</sup> The disability, however, only endures while the goods are in the importer's hands; and a sale made after they have become the property of another is a part of the internal traffic which the State may regulate at pleasure.

In *Brown v. The State of Maryland*,<sup>3</sup> a State law requiring importers and all other persons selling foreign goods wholesale, or by the bale or package, to obtain a license from the State, or be liable to a fine and other penalties, was accordingly set aside by the Supreme Court. Marshall, C.-J., reiterated the opinion expressed in *Gibbons v. Ogden*,<sup>4</sup> that the power to regulate commerce does not halt at the boundaries, but may be exercised within the limits of the States; and

<sup>1</sup> *Henderson v. The Mayor of New York*, 92 U. S. 259.

<sup>2</sup> *Robbins v. Shelby District*, 120 U. S. 489.

<sup>3</sup> 12 Wheaton, 419.

<sup>4</sup> 9 Wheaton, 1. *Ante*, p. 252.

then went on to say that the authority of Congress to license the importation of goods would be nugatory if the States could fetter the right of the importer to expose them for sale. The motive for importing was to sell; if a free sale was prevented, importation would virtually cease, and that it might be prevented was obvious, if the States could impose such burdens or restrictions as they saw fit.

Although imported goods are legitimate subjects of State taxation after they have passed into the hands of third persons, still the burden must be laid equally, and not in a way to give home products an advantage over articles made or grown elsewhere. A State cannot therefore lay a tax on persons who deal in the goods or merchandise of other States, and yet require no such license-tax from traders selling goods which are produced in the State; nor can it directly or indirectly discriminate between the products of other States or foreign countries, and its own.<sup>1</sup> The rule was laid down in *Welton v. Missouri*,<sup>2</sup> in conformity with the doctrine of *Brown v. Maryland*, and followed in *Webber v. Virginia*,<sup>3</sup> where the court assigned the following reasons in giving judgment: "Sales by manufacturers are chiefly effected through agents. A tax upon their agents, when thus engaged, is therefore a tax upon them; and if this be made to depend upon the foreign character of articles,—that is, upon their having been manufactured without the State,—it is to that extent a regulation of commerce in the articles between the States. It matters not whether the tax be laid directly upon the articles sold, or in the form of licenses for their sale. If by reason of their foreign character the State can impose a tax upon them, or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the

<sup>1</sup> *In re Watson*, 13 Fed. Rep. 511; *Corson v. Maryland*, 120 U. S. 502.

<sup>2</sup> 91 U. S. 275.

<sup>3</sup> 103 U. S. 344.

Constitution intended to guard when they vested in Congress the power to regulate commerce among the several States."

The prohibition, nevertheless, is not of taxation, but of such taxation as will subvert the equality which it is the intention of the Constitution to secure; and hence a State may tax or even prohibit the sale of wares brought from a sister State, though still in the original packages, provided articles of the same kind produced in the State are laid under a like restriction.<sup>1</sup> The clause forbidding duties on imports and exports was designed to protect foreign commerce, and does not apply to commerce among the States.

In like manner, a State may not, under color of an internal regulation of police, or even by virtue of a law really directed to that end, encroach on the power of Congress to regulate commerce; and in determining such questions the court will not merely consider the language of the statute, but its operation and the effect which it will naturally and presumably produce.<sup>2</sup>

The decisions on this important head are not altogether consistent, and fluctuate, if they do not conflict.<sup>3</sup> In *Henderson v. New York*,<sup>4</sup> Miller, J., questioned the existence of the neutral ground common to both systems, which has been admitted by other judges of great repute. The principle cannot readily be defined or summed up in a single proposition, but the just inference from the authorities seems to be that where the subject is national and admits of general rules, State legislation will be unconstitutional; and it is not an answer that Congress have refrained from legislating, because their inaction is virtually a declaration that law-making is not requisite, and commerce shall be allowed to

<sup>1</sup> *Woodruff v. Parham*, 8 Wallace, 123; *Hinson v. Lott*, Id. 148; *The License Cases*, 5 Howard, 504; *ante*, p. 253.

<sup>2</sup> *The Adams Express Co. v. The New York Police Board*, 65 Howard Prac., 72; *The People v. The Compagnie Générale Transatlantique*, 107 U. S. 59; *The People v. The Pacific Mail Co.*, 16 Ford, 34, 74; *Hall v. De Cuir*, 95 U. S. 485; *Wabash R. R. Co. v. Ill.* 118 Id. 557.

<sup>3</sup> *The Wabash R. R. Co. v. Illinois*, 118 U. S. 557, 568, 581.

<sup>4</sup> 92 U. S. 259.

take its natural course.<sup>1</sup> The intention of the Constitution is that trade with foreign nations and among the States shall, so far as uniformity is requisite and practicable, be unfettered, or subject only to such burdens as the General Government may think fit to impose; and a State law regulating navigation or subjecting it to restrictions that cannot be justified on the sanitary or other considerations which may vary with the circumstances of each locality, contravenes this principle, and cannot be sustained.<sup>2</sup>

These considerations apply with peculiar force to rules made with regard to passengers from foreign countries, and subjecting them to restraints or burdens that might be carried to a point that would amount to exclusion, and disturb the harmony of the external relations which are wholly under the care of Congress.<sup>3</sup> Few persons will deny that immigration stands in need of supervision, or that Congress were long culpably remiss in this regard; but their laches do not authorize the State legislatures to fill the void.

In *Henderson v. The Mayor of New York*, an act of assembly required the master of every vessel arriving at New York from abroad to make out a list of the passengers on board who were not citizens of the State, containing their names, birth-place, last residence and occupation, and execute a bond conditioned that the persons so enumerated should not be a charge or expense to the Commissioners of Emigration or any town or city within the State. Miller, J., said: "It is contended that there is a kind of neutral ground which may be occupied by the States, and that such legislation will be valid so long as it interferes with no act of Congress or treaty made by the United States. Such a proposition is supported by the opin-

<sup>1</sup> *Welton v. Missouri*, 91 U. S. 275; *Henderson v. New York*, 92 Id. 259; *Mobile v. Kimball*, 102 Id. 691; *Escanaba v. Chicago*, 107 Id. 687; *Robbins v. Shelby District*, 120 Id. 489, 493.

<sup>2</sup> *The Steamship Co. v. The Port Wardens of New Orleans*, 6 Wallace, 31; *Foster v. New Orleans*, 94 U. S. 246; *The Passenger Cases*, 7 Howard, 285; *Henderson v. New York*, 92 U. S. 259; *Gloucester Ferry Co. v. Pennsylvania*, 98 Penn. 105, 116; 114 U. S. 196, 204.

<sup>3</sup> *Henderson v. The Mayor of New York*, 92 U. S. 259.

ions of several of the judges in the Passenger Cases, by the decisions of this court in *Cooley v. The Board of Wardens*,<sup>1</sup> and by the cases of *Crandall v. Nevada*<sup>2</sup> and *Gilman v. Philadelphia*.<sup>3</sup> But this doctrine has always been controverted in this court, and has seldom, if ever, been stated without dissent. These decisions, however, all agree that under the commerce clause of the Constitution, or within its compass, there are powers which from their nature are exclusively in Congress; and in the case of *Cooley v. The Board of Wardens* it was said that 'whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.' A regulation which imposes onerous, perhaps impossible, conditions on those engaged in active commerce with foreign nations, must of necessity be national in its character. It is more than this, for it may properly be called *international*. It belongs to that class of laws which concern the exterior relation of this whole nation with other nations and governments. If our government should make the restrictions of these burdens on commerce the subject of a treaty, there could be no doubt that such a treaty would fall within the power conferred on the President and the Senate by the Constitution. . . .

"It is equally clear that the matter of these statutes may be, and ought to be, the subject of a uniform system or plan. The laws which govern the right to land passengers in the United States from other countries ought to be the same, whether the voyage ends in New York, Boston, New Orleans, or San Francisco."

The statute was accordingly held unconstitutional, as being not only a regulation of commerce and subversive of the uniformity which it is the object of the Constitution to promote, but tending to disturb the intercourse with foreign nations which should be exclusively regulated by Congress.

The doctrine that the States may not, by virtue of any of their powers, or of all of them combined, make laws or regu-

<sup>1</sup> 12 Howard, 299.

<sup>2</sup> 6 Wallace, 35.

<sup>3</sup> 3 Wallace, 713.

lations tending to hinder immigration, or obstruct the intercourse which is the life of commerce, was vindicated in another case arising under a California statute, which, though intended as a check on the introduction of prostitutes, implied a right on the part of the State to exclude the subjects of foreign countries, and imprison them if they attempted to evade the rule, and was consequently held to encroach on the jurisdiction of the General Government.<sup>1</sup>

This decision is not altogether consistent with the conceded right to establish a quarantine and enforce it by appropriate penalties. If the infection of small-pox or yellow fever may be averted by such means, why may not precautions be taken against the importation of professional thieves and courtesans, whose contagion is not less pernicious?<sup>2</sup> The necessity for prevention, and what measures are best adapted to that end, depend in both cases on circumstances which are known to the local legislatures, and cannot readily be ascertained by Congress; and until the central power thinks fit to regulate the subject, there can be little danger in leaving it to the States, because their errors can always be rectified at Washington.

The conclusion arrived at by the Supreme Court may be a logical deduction from the language and principles of the Constitution; but we may deplore its effect in laying the country open to the introduction of every abandoned character which Europe or Asia may cast upon our shores. If the States which are nearest to the source of infection and feel it most cannot, and the United States do not, take measures to exclude the pauper, the pickpocket, and the prostitute, — in fine, the weak and criminal of every grade, — it is not surprising that foreign vices should be added to those of native growth, with a result which endangers the peace and good order of society.<sup>3</sup> Such a decision is the more questionable

<sup>1</sup> *Chy Lung v. Freeman*, 92 U. S. 275.

<sup>2</sup> *The Passenger Cases*, 7 Howard, 283; *ante*, p. 123.

<sup>3</sup> Congress recently endeavored to mitigate the evil by passing a law for the exclusion of the Chinese; but the statute was emasculated by deciding, notwithstanding the vigorous dissent of Mr. Justice Field, that China-

because it precludes the States from taking any step to protect themselves, instead of allowing them to act subject to the paramount authority of Congress. The question is not so much whether power may be abused if shared by the States, as can they use it beneficially ; because the national legislature may always suspend the law, if mischievous, by laying down a different rule.<sup>1</sup> Had such a course been taken in the case of the Wheeling Bridge Co.,<sup>2</sup> the court would not have pronounced that a nuisance which experience proved to be beneficial, and Congress would not have reversed the judgment of the court by sanctioning the structure which it condemned. The lesson taught by this case is that where Congress have entire control of the subject, the courts should be slow to take cognizance of questions that are in effect political, and can be appropriately considered by the legislature. The laws passed by New York and California to regulate immigration should, therefore, seemingly have been left to the judgment of the assembly which represents the nation, and could ratify them if useful, or supersede them if they proved prejudicial to commerce, or gave a just ground of complaint to foreign nations.

The right of Congress to regulate immigration results from the considerations which place it beyond the control of the States ; namely, that it is a branch of commerce which involves the relations of the United States with foreign countries, and should consequently be governed according to some uniform system which the General Government is alone competent to impose. An act imposing a charge of fifty cents on the owners of steam or sailing vessels for every passenger not a citizen of this country, brought from a foreign port, is conse-

men who were in the United States at the date of the treaty of Nov. 17, 1880, and left it subsequently, were entitled to return ; thus opening a loophole through which new immigrants might find their way into the country under the pretence that they were returning to the domicile which they had previously acquired. *Chew Heong v. The United States*, 112 U. S. 536, 568, 577.

<sup>1</sup> *Gilman v. Philadelphia*, 3 Wallace, 713 ; *Mobile v. Kimball*, 102 U. S. 691.

<sup>2</sup> 13 Howard, 518 ; 18 Id. 421 ; *post*, p. 494.

quently a valid exercise of the power to regulate commerce.<sup>1</sup> Though the previous cases related to State statutes only, they held those statutes void, on the ground that authority to enact them was vested exclusively in Congress by the Constitution, which necessarily implied that when Congress did pass such a statute it would be valid. The contribution levied on the ship-owner was designed to mitigate the evils incident to immigration from abroad, by raising a fund for that purpose, and being a regulation of commerce was not subject to the limitations imposed on the power to tax. In like manner, the power to regulate commerce carries with it the right to establish a uniform currency, as essential to the successful prosecution of trade; and an impost of ten per cent on the notes of State banks may be valid on this ground, although it would clearly be unconstitutional as a tax;<sup>2</sup> and such would also seem to be the true basis of the controverted right of Congress to issue notes and make them a legal tender.<sup>3</sup>

The rule is nearly, if not quite, the same as regards the means of intercourse among the several States. The question arose in *Crandall v. Nevada*,<sup>4</sup> under an act of assembly taxing railroad and stage-coach companies for every passenger carried out of or through the State. A majority of the court doubted whether the transportation of passengers belongs to the same category as that of goods and chattels and can be regarded as a commercial operation, but were notwithstanding of opinion that the law was unconstitutional, for the following reasons. If the tax was in form on the business of incorporated companies owing their existence to the State, it was in effect a tax on the passengers whom they carried, for the privilege of passing through the State by the ordinary means of conveyance. Passengers were not goods or merchandise, and hence such a tax did not conflict with the provision of the Federal Constitution which

<sup>1</sup> The Head-money Cases, 112 U. S. 580.

<sup>2</sup> The Veazie Bank v. Penny, 8 Wallace, 533; *ante*, p. 272.

<sup>3</sup> See *Borie v. Trott*, Philad., 366, 885.

<sup>4</sup> 6 Wallace, 35; *ante*, p. 269.

forbids a State to lay a duty on exports. The power of Congress to regulate commerce with foreign nations and among the States included matters which were necessarily of a national character, and therefore exclusively within the control of Congress; but it also included others that were more or less local and could not well be brought under any general rule, such as the regulation of port pilots, and the authorization of bridges over navigable streams; and upon this class of subjects the States might legislate in the absence of legislation by Congress.

If the tax on passengers carried through or out of Nevada could be called a regulation of commerce, it belonged to the latter class; and there being no law of Congress on the subject, the way remained open for State legislation.

There was, however, another aspect of the question. The United States had a right to require the services of their citizens at the seat of the Federal Government in the various executive, legislative, and judicial departments, and at all the points in the several States where the functions of government were to be performed. If this right was not conferred expressly by the Constitution, or a necessary result of any one of the enumerated powers, it nevertheless resulted by a necessary implication from the instrument as a whole, as being that without which the object of the grant must fail.

By virtue of the power to make war and suppress insurrection the government was entitled to transport troops through all parts of the Union by the usual and most expeditious modes of conveyance; and the citizen had a correlative right to visit the national capital, the ports through which commerce found entrance, and the various offices in which the functions of government were performed. The power to tax was, if carried far enough, prohibitory or destructive; and if the right of transit could be taxed by the States at pleasure, a necessary relation between the General Government and the citizen might be impaired.

The law of Nevada was consequently at variance with a right which the Constitution impliedly conferred, and must be set aside. Chase, C.-J., and Clifford, J., concurred in the

judgment of the court, but based their opinion on the simpler ground that the act of the State legislature was inconsistent with the power conferred upon Congress to regulate commerce among the several States. They doubted whether Congress could levy any such tax, and were clear that intercourse could not be so trammelled by a State.

This decision is interesting, not only from the magnitude of the question involved, but in view of the argument that an authority may be deduced from the enumerated powers conjointly that cannot be found in any one of them taken separately. The argument was not new; it had been urged by Strong, J., in *Shollenberger v. Brinton*<sup>1</sup> as one of the grounds for sustaining the act making the notes of the United States a legal tender for the payment of debts.

The argument in *Crandall v. Nevada*, that the transportation of passengers from one part of the United States to another is no part of commerce because passengers are not merchandise, and that if it were it might still be taxed by the States as being local and not national, can hardly be reconciled with the judgment in the License Cases and the doctrine of Chief-Justice Marshall in *Gibbons v. Ogden*, that commerce includes intercourse as well as traffic, and that this definition applies to commerce among the States. If a State cannot impose duties or restrictions on immigrants, much less should it be allowed to hinder the citizens of the United States from visiting any section of their common country. A tax laid by New Jersey on all persons passing through her territory by rail might fill her coffers, but would be a serious impediment to the intercourse of Washington, Baltimore, and Philadelphia with New York. In this aspect of the question, it is obviously immaterial whether the instrument is a railway train or a vessel, and whether it is employed in bringing goods or passengers from abroad or in carrying them from State to State.<sup>2</sup>

For like reasons, while a Pullman car, ship, or ferry-boat

<sup>1</sup> 62 Pa. St. 61.

<sup>2</sup> *Pickard v. The Pullman Car Co.*, 117 U. S. 34; 16 Fed. Rep. 103; *The Wabash R. R. Co.*, 118 Id. 557, 575; *Robbins v. Shelby District*,

may be taxed in the locality where it is employed and the owner of it taxed in the place where he resides, no tax or license fee can be laid or demanded for the privilege of using it as a means of interstate or foreign commerce.<sup>1</sup> So an act requiring railroad companies to pay a tax on "each thousand pounds of freight carried," is unconstitutional "so far as it affects commodities transported through the State or from points without the State to points within the State, or from points within the State to points without it."<sup>2</sup>

It results from these decisions that the carriage of freight or passengers from one State to another is commerce within the meaning of the Constitution, and exclusively under the control of Congress; and a State law which in effect operates on the entire transitus will be invalid, although the restriction is confined in terms to so much of the journey as is performed within the State.<sup>3</sup> An act of assembly providing that all persons travelling by a public conveyance which passes through two or more States or from one State to another shall have equal privileges in every part of the train or vessel, without regard to race or color, and that a discrimination in these respects shall be a ground for the recovery of damages, was accordingly declared in *Hall v. De Cuir*<sup>4</sup> to be a regulation of interstate commerce, and consequently beyond the reach of local legislation. If one State might require that persons of different colors should occupy the same cabin, another might insist that they should be kept apart; and amidst such a diversity of rules commerce would be embarrassed, if not destroyed. If such legislation was requisite for the public good, it must proceed from Congress, and not from the several States.

120 Id. 489, 494; *Carter v. The Illinois Central R. R.*, 59 Iowa, 148; *The Bridge Co. v. The United States*, 105 U. S. 470.

<sup>1</sup> *St. Louis v. The Ferry Co.*, 11 Wallace, 423; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Pickard v. The Pullman Car Co.*, 117 Id. 34; *Wabash R. R. Co. v. Illinois*, 118 Id. 567, 575.

<sup>2</sup> *The State Freight Tax*, 15 Wallace, 232; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 242; *Fargo v. Michigan*, 121 Id. 230, 245.

<sup>3</sup> *The State Freight Tax*, 15 Wallace, 232; *The Wabash R. R. Co. v. Illinois*, 118 U. S. 557, 570.

<sup>4</sup> 95 U. S. 485.

That Congress had not legislated, was not a proof that they meant to leave the way open for State legislation, because it might indicate an intention on their part that the subject should be governed by the rules and principles of the common law. As had been said by Mr. Justice Field in *Welton v. The State of Missouri*,<sup>1</sup> the inaction of the national legislature in cases of this description is equivalent to a declaration that interstate commerce shall remain free and untrammelled.

It is at the same time plain that a railway train or steamer passing through a State is an instrumentality of internal as well as of interstate commerce, and may consequently be subjected to any regulation in the former capacity which does not impair its usefulness in the latter, or hinder commerce among the States.<sup>2</sup> State laws requiring passenger trains to stop at county seats, and forbidding unjust discrimination in charges for freight and passage, may consequently be valid if the entire journey is within the State, whether the road does or does not go farther. But a State cannot prescribe the rates at which freight shall be carried through or from it to other States, because such a law operates directly on interstate commerce;<sup>3</sup> or so regulate the local fares as to raise the price of transportation into, through, or out of the State, or preclude railway companies from prescribing the terms for the carriage of goods or passengers from one point in the United States to any other, unless both termini are within the State and the entire line is subject to her control. Such is the established rule as to taxes on freight carried through a State; and it applies to the regulation of fares, because the objection to such taxation is that the amount is always added to the cost of transportation, and thus indirectly increases fares. The right of a railway company to demand a higher rate "for a short than for a long haul," and thus in effect

<sup>1</sup> 91 U. S. R. 282.

<sup>2</sup> *The Railroad Commission Cases*, 116 U. S. 307, 333; *The Wabash R. R. Co. v. The People*, 105 Ill. 236; *The Chicago R. R. v. The People*, Id. 657.

<sup>3</sup> *Carton v. The Illinois Central R. R. Co.*, 59 Iowa, 148.

discriminate against the former, cannot therefore be abridged as regards goods or passengers carried under one contract and by one voyage from State to State, though such restrictions may well be laid on journeys beginning and ending in the State.<sup>1</sup> A law of Illinois that no railroad company "shall charge or receive the same or a greater sum for the transportation of passengers or freight of the same class for any distance within the State than it does for a longer distance," was accordingly held to be unconstitutional, because it was so drawn as to be applicable although such greater distance was without the State, and in effect required contracts for interstate transportation to be made as to so much of the way as lay in Illinois in accordance with the rule which it prescribed.

The phrase "commerce among the States" might seem broad enough to include every species of traffic between persons residing in different States, or entering into an agreement in one State for the sale and delivery of goods in another; but this would be a more liberal interpretation than the clause has yet received, or was presumably contemplated by the framers of the Constitution. In *Paul v. Virginia*<sup>2</sup> the court held that policies of insurance are not commercial contracts, but contracts of indemnity which cannot be regulated by Congress whether the party insured is, or is not, a resident of the same State as the insurers.<sup>3</sup>

It may be inferred from the *dicta* in this case and in *Nathan v. Louisiana*<sup>4</sup> that bills of exchange drawn on another State or foreign country may be the subject of State legislation, prescribing the place and time at which demand must be made and notice given to charge the drawer with damages for non-payment. The point actually decided in *Nathan v. Louisiana*, however, was that a tax on the business of an exchange-broker is not a tax on commerce, though he is principally or exclusively engaged in the purchase and

<sup>1</sup> *Wabash R. R. Co. v. Illinois*, 118 U. S. 570.

<sup>2</sup> 8 Wallace, 168.

<sup>3</sup> *Ins. Co. of N. A. v. The Commonwealth*, 87 Pa. St. 173.

<sup>4</sup> 8 Howard, 73.

sale of foreign bills of exchange ; and it does not follow from these decisions that such bills may not be regulated by Congress, or that a State may subject them to restrictions which will injuriously affect trade with foreign nations or among the States. It is by means of such instruments that the merchant anticipates the sale of the goods which he has purchased for exportation, and is enabled to make an immediate payment ; and they are consequently an indispensable aid to commerce, which should be free from local taxation.

Whatever the rule may be as to bills of exchange, it results from the case of *Almy v. California*,<sup>1</sup> as interpreted in *Woodruff v. Parham*,<sup>2</sup> that bills of lading are so far instruments of commerce that the States cannot subject them to a tax that will impede exportation or operate hostilely on interstate or foreign commerce. Every such law must moreover conform to the rule that a State cannot directly or indirectly, by taxation or in any other way, discriminate against the wares of other States, or make any law that will place them at a disadvantage as compared with her own products.<sup>3</sup>

A tax on the sale of intoxicating liquors brought from other States which is confined to persons not residing or having their principal place of business within the State, is therefore a restraint on interstate commerce, and a discrimination which the Constitution forbids, and cannot be upheld as an exercise of the police power for the preservation of health and morals.<sup>4</sup>

Corporations are creatures of legislation, and have no legal existence beyond the jurisdiction of the government to which they owe their being. No other government, therefore, need recognize them or give them the protection of its laws, save from a comity of which the legislature must judge ; and as artificial persons they are not within the clause that the citizens of each State shall have all the rights, privileges, and

<sup>1</sup> 24 Howard, 169.

<sup>2</sup> 8 Wallace, 123, 137.

<sup>3</sup> *In re Watson*, 15 Fed. Rep. 511; *Marshalltown v. Blum*, 58 Iowa, 184.

<sup>4</sup> *Malling v. Meagher*, 116 U. S. 444; see *Higgins v. Three Hundred Casks of Lime*, 130 Mass. 1; *Welton v. Missouri*, 91 U. S. 275.

immunities of the citizens of the several States. A State may therefore exclude foreign corporations, or prescribe the terms on which they shall be permitted to transact business within her limits, and exact a license fee as the price of admission;<sup>1</sup> but the power must be so exercised as not to hinder, regulate, or burden the commerce among the States or with foreign countries, which is exclusively under the control of the General Government, whether the persons who carry it on are natural or artificial citizens of the States, or subjects of a foreign government; and a statute which imposes limitations on the right of companies chartered by other States to make contracts in the prosecution of interstate commerce, is a usurpation of a power that belongs solely to Congress.<sup>2</sup> In *The Cooper Manuf. Co. v. Ferguson*, suit was brought on a contract made in Colorado by a company incorporated in Ohio, to manufacture machinery in the latter State and deliver it to the defendants for transportation to Colorado, and the defence was that the company had not complied with a law of Colorado requiring foreign corporations, before transacting any business in the State, to file a certificate designating the place where such business was carried on, and giving the name of an agent on whom process could be served; and it was held that though corporations chartered by other States might be forbidden to acquire a domicile in Colorado and manufacture machinery there, they could not be directly or indirectly precluded from manufacturing machinery elsewhere and selling it in Colorado.

<sup>1</sup> *Pennsylvania v. The Standard Oil Co.*, 101 Pa. 119, 147; *Paul v. Virginia*, 8 Wallace, 168; *Ducat v. Chicago*, 10 Id. 410; *Bank of Augusta v. Earle*, 13 Peters, 519.

<sup>2</sup> *Cooper Manuf. Co. v. Ferguson*, 113 U. S. 727, 736; *Pennsylvania v. The Standard Oil Co.*, 101 Pa. 119, 148; *Paul v. Virginia*, 8 Wallace, 168.

## LECTURE XXIII.

Regulation of Commerce (*concluded*). — Postal Service. — Telegraphy. — River and Harbor Improvements. — Highways. — Obstruction of Navigable Streams. — Highways and Bridges and Ferries as incident to Highways under the Contract of the States. — Power of the States to bridge Navigable Streams subordinate to Congress when such a Bridge may be abated as a Nuisance.

THE effectual prosecution of commerce requires that buyers and sellers shall be able not only to communicate with each other personally or through the post-office, but by telegraphy, or any means that science may devise; and as the power to regulate commerce is given absolutely, it includes the adoption of any measure that will facilitate the meeting of minds for the sale or exchange of goods, or the negotiation of other commercial contracts. As business is now transacted, it would be of comparatively little consequence that the transit by rail or boat should be free from obstruction if telegrams and letters could be subjected to onerous duties or restraints. The mail is exclusively under the control of the General Government, by virtue of the power to establish post-offices and post-roads; and although telegraphy was unknown to the framers of the Constitution, it is none the less subject to the authority of Congress, which may be so exercised as to exclude the jurisdiction of the States.

It was accordingly held in *The Pensacola Telegraph Co. v. The Western Union Telegraph Co.*<sup>1</sup> that telegraph lines are "instrumentalities of commerce" which may be regulated by Congress; and that when Congress has exercised the power by prescribing the conditions on which telegraph companies may prosecute their business, a State cannot exclude a company which has complied with the terms of the act from its terri-

<sup>1</sup> 96 U. S. 1.

tory, by the grant of an exclusive right to another company, or lay it under rules or restrictions which will conflict with the privileges granted by Congress. The court said the right to enact such a statute was incident to the authority of Congress over the postal service, and expressed a doubt whether the law of Florida would have been constitutional even if Congress had not legislated. The doctrine that a telegraph line may be an appropriate mode of executing the power to establish post-offices and post-roads, would seem to be novel; but there is no doubt that telegraphic communication is, as society is now organized, almost indispensable to the intercourse without which commerce cannot be effectually prosecuted, and may consequently, at all events when linking State to State, be regulated by the General Government.

“Since the case of *Gibbons v. Ogden*,”<sup>1</sup> said Waite, C.-J., in this instance,<sup>2</sup> “it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post-offices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the national government.

“The powers thus granted are not confined to the instrumentalities of commerce or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the General Government for the good of the nation, it is not only the right, but the duty of Congress to see to

<sup>1</sup> 9 Wheaton, 1.

<sup>2</sup> 96 U. S. 9.

it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation.

“The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business and become one of the necessities of commerce. It is indispensable as a means of intercommunication, but especially is it so in commercial transactions. Goods are sold and money paid upon telegraphic orders. Contracts are made by telegraphic correspondence, cargoes secured, and the movement of ships directed. The telegraphic announcement of the markets abroad regulates prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information.

“It is not only important to the people, but to the government. By means of it the heads of the departments in Washington are kept in close communication with all their various agencies at home and abroad, and can know at almost any hour by inquiry what is transpiring anywhere that affects the interest they have in charge. Under such circumstances it cannot for a moment be doubted that this powerful agency of commerce and intercommunication comes within the controlling power of Congress, certainly as against hostile State legislation.

“The State of Florida has attempted to confer upon a single corporation the exclusive right of transmitting intelligence by telegraph over a certain portion of its territory. This embraces the two westernmost counties of the State, and extends from Alabama to the Gulf. No telegraph line can cross the State from east to west, or from north to south, within these counties, except it passes over this territory.

“Within it is situated an important seaport, at which business centres and with which those engaged in commercial pursuits have occasion more or less to communicate. The United States have there also the necessary machinery of the national government. They have a navy-yard, forts, custom-houses, courts, post-offices, and the appropriate officers for the enforcement of the laws. The legislation of Florida, if sustained,

excludes all commercial intercourse by telegraph between the citizens of other States and those residing upon this territory, except by the employment of this corporation. The United States cannot communicate with their own officers by telegraph except in the same way. The State therefore clearly has attempted to regulate commercial intercourse between its citizens and those of other States, and to control the transmission of all telegraphic correspondence within its own jurisdiction.

“It is unnecessary to decide how far this might have been done if Congress had not acted upon the same subject, for it has acted. The statute of July 24, 1866, in effect amounts to a prohibition of all State monopolies in this particular. It substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the government of the United States and its citizens, that the erection of telegraph lines shall, so far as State interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one State for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction if they accept the terms proposed by the national government for this national privilege. To this extent certainly the statute is a legitimate regulation of commercial intercourse among the States, and is appropriate legislation to carry into execution the powers of Congress over the postal service. It gives no foreign corporation the right to enter upon private property without the consent of the owner, and erect the necessary structures for its business; but it does provide that, whenever the consent of the owner is obtained, no State legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges.”

If the vessels which are instruments of commerce are subject to the authority of Congress, and it extends to the waters on which they sail, it should also warrant the removal of the rocks and shoals which impede navigation, or the construction of the dams, locks, and canals requisite for an artificial chan-

nel. It would be absurd to conceive of the government of the United States as powerless to deepen the mouths of the Mississippi, or open a communication between the Great Lakes and the Atlantic ; and if the power exists, Congress may obviously declare in what way it shall be used. It was accordingly decided in *South Carolina v. Georgia*<sup>1</sup> that the General Government may improve the navigation of a river without the consent of the States between which it flows, by erecting a crib or dam across one of its channels, and turning the whole force of the current into another, although the effect is to render the former too shallow for the passage of vessels, and injure a riparian owner. The question which channel shall be left open, and in what way the water can best be deepened, is for Congress, and their decision cannot be reversed by the courts. Here, however, as in the case of pilotage, and most others where there is room for both governments, the State possesses a concurrent power which may be exercised so long as Congress refrains.

We here touch the question of internal improvement, which forms a part of the debatable ground that has been fought over by the opponents and advocates of a liberal interpretation. The improvement of a navigable river would seem to be analogous in this regard to the construction of a highway or railroad from State to State, or as a means of access to the seaboard ; and if the commercial power includes either, it must seemingly cover both.<sup>2</sup> It is obvious, nevertheless, that in view of the spirit of the Constitution and the objects which its framers had in view, the United States should not adopt any measure that does not concern the entire Union, or that may be adequately carried into effect by the States. Tried by this test, the removal of obstructions to navigation will ordinarily devolve on the General Government, while highways may be effectually provided for by local legislation. Such accordingly has been the practice from the outset, where the circumstances do not, as in the case of the Cumberland Road and Union Pacific Railway, constitute an exception to the general rule.

<sup>1</sup> 93 U. S. 4. See *ante*, Lecture xv.

<sup>2</sup> *Bridge Co. v. The United States*, 105 U. S. 470.

The question is political, as depending on the exercise of a discretionary power, and does not fall within the judicial province.

The right of the States to construct highways is obvious and indispensable, and we have seen that their authority extends so far over rivers that they may take measures for the improvement of the navigation, subject to the paramount authority of Congress; and the right to build the bridges without which highways must necessarily be incomplete, would seem to be a necessary inference from these premises.

There is nevertheless a difficulty in the application of the principle, because the erection of a bridge or viaduct may impede navigation; and the question gave rise to a protracted controversy, which is not yet entirely closed.

The navigable rivers which form a distinctive feature in the geography of the United States are highways of foreign and domestic trade. Through these commerce hourly sends a fleet of vessels of various kinds, and propelled by every means contrived by the ingenuity of man. This traffic is not confined to the larger rivers, the Mississippi, the Ohio, the Delaware, or the Hudson; it ramifies through their affluents and spreads over the great lakes, which are connected by natural or artificial channels.<sup>1</sup> It was accordingly declared by Chief-Justice Marshall, in *Gibbons v. Ogden*, that wherever commerce can ascend through the instrumentality of navigation, the power of the United States goes with it for its protection, and may be exercised for the removal of any impediment that may be occasioned by State legislation.

There is another aspect of the question. If the streams which furrow the surface of the continent are a means of intercourse, they are also a cause of severance. Neighboring towns prosper in each other's sight on either side of the channel, and desire a certain means of communication. A city arises on the margin, and cannot expand without bridges, or needs them as connecting links with its suburbs; a railroad chartered by a State and brought hundreds of miles

<sup>1</sup> *The Daniel Ball*, 10 Wallace, 557; *Escanaba Co. v. Chicago*, 107 U. S. 678.

over mountains and through the interposing strata of the hills, meets with a river which it cannot cross without the erection of a viaduct that may impede navigation. The river, instead of connecting, now divides. The stream which bears the mariner or the boatman, arrests the traveller. The vessel passes, but the railway train is delayed. The choice is necessarily between opposite evils. If the river is bridged, commerce may suffer in one important particular; if it is not, an inconvenience will be felt in another of equal or greater magnitude. Fifty years ago a preference would have been given to the river by universal consent; since then railroads have come into being, and have an undeniable claim to consideration as a means of commerce. The right of ultimate decision in cases of this kind confessedly belongs to the United States, and it is conceded that Congress may authorize or prohibit the erection of a bridge or other structure tending to close or obstruct the channel of a navigable stream. The doubt is whether and under what circumstances such an authority can be exercised by the States in the absence of national legislation.

In *Wilson v. The Blackbird Creek Co.*,<sup>1</sup> the State of Delaware had authorized the erection of a dam across a small navigable creek, the object being to exclude the tide and reclaim a marsh which was a source of disease. The plaintiff in error broke down the dam, and was sued by the company which the State had chartered. He contended that the act of incorporation was unconstitutional, as interfering with the authority of Congress to regulate commerce, and especially with his right as the owner and master of a coasting vessel duly licensed by the United States to use all the navigable waters of the Union as a means of trade. Chief-Justice Marshall, in delivering the judgment of the court, held that the law of Delaware was not a regulation of commerce, but an exercise of the right which every State has to adopt such measures as will, in the opinion of the legislature, promote the health of the inhabitants or give additional value to the land; that if the law were in conflict with the Constitution

<sup>1</sup> 2 Peters, 245.

or a law of the United States, the court would have no difficulty in pronouncing it void; but Congress had passed no statute regulating the navigation of the particular creek, or of such creeks in general. While their power to do so remained dormant, there could be no such conflict between it and the act of the Delaware legislature as would render the latter invalid.

In *Pound v. Turk*,<sup>1</sup> a statute of Wisconsin authorized the erection of one or more dams across a small navigable stream lying wholly within the limits of the State, but emptying its waters into the Mississippi, the object being to stop and collect floating logs; and the statute was held to be a defence to an action brought for the obstruction, within the scope of the decision in the case of *Blackbird Creek*, although it seriously impeded the navigation of the river. The right of the State to close such streams was sustained in *Grover v. Powell*;<sup>2</sup> and it was also held that the act could not be repealed to the injury of the persons who had acted in reliance on its terms without compensating them for the loss.

The Chief-Justice did not, in delivering judgment in the case of *Blackbird Creek*, touch a point which might seem to be material. In *Gibbons v. Ogden* the license issued to the steamboat of the appellant as a coasting vessel was construed as an authority to navigate all the waters of the United States; and it was held to follow that the statute of New York, by which such boats were excluded from the waters of New York, which were also waters of the United States, could not stand. The statute of Delaware, by which the plaintiff in *Wilson v. The Blackbird Creek Co.* was in effect shut out from a navigable inlet, seems to have been within this principle. Whether navigation is hindered by a legislative prohibition or by a structure erected under color of law, the injurious consequences are the same. If there is no right to impose the one, there can be none, as it would seem, to sanction a resort to the other. It can hardly be supposed that the length of the stream makes the difference;

<sup>1</sup> 95 U. S. 459.

<sup>2</sup> 2 Stockton's Chan. 211.

that Blackbird Creek might be closed because it only extended a few miles inland, and that the Hudson could not, because it is a great avenue of commerce. This would be a political reason rather than a judicial. In one respect the cases were not legally the same. Congress had established ports of entry on the Hudson, and there were none on Blackbird Creek. A coasting license is, however, an authority to use any of the waters of the United States for the purpose of navigation, and not merely those which have been designated for the collection of dues on foreign merchandise.<sup>1</sup> It is no doubt true that when a port of entry is established, the waters leading from it to the sea are impliedly declared to be navigable; but a State can hardly be entitled to close every stream on which no such port exists. The material distinction seems to be, not the comparative insignificance of Blackbird Creek, or even that it was wholly within the State of Delaware; but that the legislature in closing it acted by virtue of the police power which confessedly remains in the State, while the statute which was set aside in *Gibbons v. Ogden* was in effect a regulation of commerce, and as such encroached on a power which, save exceptionally, can only be exercised by Congress.

If this case fell short of the doctrine of *Gibbons v. Ogden*, it was carried to its full extent in *Pennsylvania v. The Wheeling Bridge Co.*,<sup>2</sup> where the question arose under the following circumstances. The defendants built a bridge across the Ohio at Wheeling, under a charter from the Virginia legislature and within the limits of that State, which the State of Pennsylvania sought to enjoin as an obstruction to navigation, erected without an authority from Congress, and constituting in effect a public nuisance. The case was referred on the questions of fact to a commissioner, who made a report sustaining the allegation of the bill, that the bridge was too low to permit steamers of the larger class to pass in time of flood without lowering their funnels, which would be

<sup>1</sup> *The Steamboat Co. v. Livingston*, 3 Cowen, 713; *The People v. The Saratoga R. R. Co.*, 15 Wend. 113, 131.

<sup>2</sup> 13 Howard, 518.

a serious impediment to navigation. The case was ably argued for the complainant by Mr. Stanton, whose subsequent career is a convincing proof that forensic ability is not incompatible with the qualities of a great administrator and minister of war. He contended that the Ohio was a public highway of commerce, established and recognized as such by Congress and the legislatures of the States between which it ran. That as far back as 1786 Congress had resolved that the Mississippi, the St. Lawrence, and the carrying places between the same, were common highways, and as such should be forever free to the inhabitants of the adjacent land and to the citizens of the United States and of any States that might subsequently enter the Confederation. This regulation was embodied in the ordinance of 1787, for the regulation of the territory to the northwest of the Ohio, which was still in force. That by the act passed in 1789 by the legislature of Virginia, authorizing the erection of the territory west of the mountains into a State, it was provided that the Ohio should, within the limits of Virginia and of the proposed State, be free and common to the citizens of the United States. Congress assented to this act soon after the adoption of the Constitution, and it became a compact between Virginia and the General Government of the Union. Nor was this all. Ports had been established at various points on the Ohio by the act of Congress, and surveyors appointed, appropriations had been made to deepen the channel and remove obstructions, and finally a law was passed for licensing and enrolling steamers navigating the Ohio, — the very steamers which the bridge would delay and hinder or arrest. That the bridge was a nuisance sufficiently appeared from the proofs; and if so, it contravened the Constitution and the laws passed in pursuance of it by the legislature, and should be abated.

In delivering the opinion of the court, McLean, J., held that the State of Pennsylvania could not, in her sovereign capacity or on behalf of the citizens of the State, maintain a suit for an injury by which their interests were affected and not hers. If they were injured, and she was not, they must

sue in their own persons. But this was not the case before the court. The State could not sue as a political society. She might seek redress as the owner of the lines of railroad and canal which, traversing the State, terminated at the Ohio, and would be rendered less productive if the navigation of that river was closed. In this respect she had, like any other proprietor, a right to the protection of the court against acts contrary to the Constitution and laws of the Union. Was the bridge in question an act of this description? The report of the commissioner to whom the case had been referred, established that the bridge was a public nuisance, as obstructing a river which was undeniably a public highway. Had this been all, the suit would have failed. The Supreme Court had no original jurisdiction under the common law. To call their powers into operation, it must appear, not only that a right was invaded, but that it was conferred or guaranteed by the Constitution or laws of the United States. In the case before the court this sufficiently appeared from the language of the acts of Congress which had been cited by the complainant. Congress had not declared in terms that a State should not obstruct the navigation of the Ohio, but they had, by licensing vessels, establishing ports of entry, and imposing duties on the masters and officers of the boats traversing that river, recognized it as navigable, and manifested their intention that it should remain open to navigation; and the compact made with Kentucky at the time of the admission of the latter State into the Union,—that the use and navigation of the river Ohio should remain free and common to the citizens of the United States, — was not only a legislative compact in which Pennsylvania was interested, and which Virginia could not impair consistently with the Constitution, but had by the express sanction of Congress become a law of the Union. No further legislation was necessary to call forth the powers of the court. It was accordingly decreed that the bridge should be abated, unless it was raised to a height of a hundred and eleven feet above low-water mark, on or before the eleventh of the month of February next ensuing.

From this decree Chief-Justice Taney dissented, on the ground that Congress had not forbidden bridges over the navigable rivers of the United States, or declared expressly that the navigation of the Ohio should not be impeded by the erection of such structures as might be requisite to afford the means of crossing the stream; and until they did, the court could not deduce such a prohibition from the language of the acts that had been passed by Congress. A law licensing a steamer to run on a river, or prescribing the manner in which it should be equipped and managed, was not a law forbidding the erection of a bridge across the same or any other river. If the intention had been to prohibit bridges over the Ohio, it would have been expressed in distinct and unmistakable terms. The case was distinguishable from *Gibbons v. Ogden*. When the legislature of New York granted an exclusive privilege by law to certain persons, the law in effect excluded vessels licensed by the United States from navigating the waters of the State. Here no one was shut out, no exclusive privilege granted. The object was not to exclude shipping, but to authorize the construction of a bridge. If navigation was impeded, the injury was casual and incidental. The remedy, therefore, was legislative, and not judicial. When Congress legislated, the court would know how to enforce the law.

Daniel, J., who also dissented, took a position which would seem to be the key to the whole controversy. It was, he said, conceded that the bridge should not be abated unless it was a public nuisance; or, in other words, unless it was a source of injury to the community. In determining this question it was necessary to consider not only the effect which allowing the structure to remain would have on the trade of the river, but the effect which removing it would have on the not less important trade which passed over the railway. The injury to navigation would confessedly be slight if the bridge stood; there would be serious delay and embarrassment in the passage of trains if it was removed. And as the advantage equalled, if it did not exceed, the inconvenience, the structure could not be pronounced a nuisance. To sustain

this view he cited the case of *The King v. Russell*,<sup>1</sup> where Bayley, J., had held that in determining whether a wharf or other structure by which navigation was impeded should be abated, it was necessary to look beyond the thing itself to the purpose for which it was erected, and consider whether, taken as a whole, it facilitated or hindered trade. Every wharf in some degree obstructed navigation by narrowing the channel and turning part of the waterway into solid ground. If the motive was pleasure, caprice, or whim, and the erection interfered in the least degree with the right of passage, it would be a nuisance. But the case was widely different where the object was to facilitate trade, and the inconvenience slight in proportion to the benefit. The case of *The People v. The Rensselaer & Saratoga Railroad* <sup>2</sup> was also cited as proceeding on the same ground, and directly in point. Savage, C.-J., had there said that the power to erect bridges over navigable streams had been so far surrendered that no bridge could be erected which interfered with the freedom of navigation, but that a free navigation did not mean a navigation free from such partial obstacles and impediments as might arise from structures conducive to the general good.

The controversy did not end here. An injunction having been awarded to enforce the decree, and a rule granted to show cause why the defendants should not be attached for a contempt of court, they answered that Congress had, in the year 1853, subsequently to the judgment, enacted that the bridges across the Ohio River at Wheeling were "lawful structures in their present position and elevation, and should be so held and taken to be, any law or laws of the United States to the contrary notwithstanding;" and they were further declared "to be post-roads for the passage of the mails of the United States." The court held that this statute was conclusive, and left nothing open for judicial consideration. Whether Congress could or could not legalize the bridges by virtue of the power to establish post-offices and post-roads, they undoubtedly had ample authority for that

<sup>1</sup> 6 B. & C. 593.

<sup>2</sup> 15 Wend. 113.

end under the power to regulate commerce among the several States.

The regulation of commerce includes intercourse and navigation, and consequently the right to determine what may or may not be done in point of law in relation to navigation; and that power had been exerted to sustain the bridge. If the structure, which Congress had sanctioned, hindered trade at Wheeling, or turned it into other channels, this was not a reason for treating the statute as at variance with the clause of section 9 of Article I., that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another. Many acts of Congress passed under the power to regulate commerce might incidentally operate to the prejudice of a riparian property holder or town; but it would not do to say that the exercise of an enumerated power was unconstitutional because the law incidentally produced results that lay beyond the limit of the power used. Nor was it of greater consequence that the statute went to annul a previous judgment. Had the decree been for damages occasioned by the obstruction while it was still unlawful, the right so acquired would have been beyond the reach of Congress; and the costs which had been adjudged to the complainant were within this principle. But that part of the decree which directed the abatement of the obstruction was executory, and depended for its validity on whether the structure did or did not interfere with the right of navigation; and if, in the mean time, this right was so modified as not to be injuriously affected by the maintenance of the bridges, there was no longer anything that the court could properly enjoin.<sup>1</sup> It was decided in like manner in the case of the Clinton Bridge<sup>2</sup> that an act of Congress declaring a bridge across the Mississippi River lawful, was conclusive both on the State and national tribunals, and a sufficient answer to a suit for the abatement of the bridge as a nuisance.

These cases were followed in *Miller v. The Mayor of New*

<sup>1</sup> *The State of Pennsylvania v. The Wheeling Bridge Co.*, 18 Howard, 421, 430, 431.

<sup>2</sup> 13 Wallace, 454.

York,<sup>1</sup> and an act of Congress authorizing the construction of a suspension-bridge across the East River at New York, according to a plan and at a location to be approved of by the Secretary of War, was held to be a conclusive answer to an allegation that it was an injurious impediment to navigation, although large vessels could not pass under it without striking their top-gallant masts.

It follows conversely that a bridge over a navigable river is, even when authorized by State legislation, subject to the control of Congress, who may sanction its continuance or order it to be abated as a hindrance to navigation, without compensating the owners, who voluntarily incurred the risk, and can no more complain than can the owner of a house of a change in the grade of the street before his door. The case is not the same where the bridge is erected under an authority from Congress. Such a grant is not merely a contract, but confers a right of property; and if the United States are not forbidden to impair the obligation of contracts, they cannot deprive a man of his property save through the right of eminent domain and with the compensation which that implies. So much may be inferred from the language held in *Bridge Co. v. United States*,<sup>2</sup> although the point did not arise, because Congress had in passing the act reserved the right to revoke the authority which it conferred, should the bridge prove an impediment to navigation.

While these decisions give the measure of the authority, there is still room for doubt as to how far the States may act when Congress have not legislated save by the statutes passed for the regulation of navigation, and applicable to all the waters of the United States.

The question arose in *Gilman v. Philadelphia*,<sup>3</sup> with a result which showed that something had been learned from experience. A bill was there filed to enjoin the city of Philadelphia from erecting a bridge across the River Schuylkill, under the authority of a law passed by the legislature of Pennsylvania. It appeared from the pleadings that the bridge, which was permanent and without a draw, would

<sup>1</sup> 109 U. S. 388.

<sup>2</sup> 105 U. S. 492.

<sup>3</sup> 3 Wallace, 713.

prevent vessels from ascending the stream to a point some hundred yards farther up, where navigation ceased. The effect, consequently, was to deprive that portion of the city which lay beyond of a means of access to the sea. Philadelphia had been declared a port of entry by Congress, and the plaintiff owned a wharf within the limits of the port and above the bridge. The chief difference between this case and that of the Wheeling Bridge was, that the Schuylkill has its entire course in the State of Pennsylvania, and had not been distinctly recognized by Congress as a navigable river. But it was navigable in point of fact for sea-going vessels to Philadelphia, and the shores and waters of the River Delaware and the rivers connected therewith had been established by Congress as a district of which Philadelphia was the port of entry. In delivering the opinion of the court, Swayne, J., said that if Congress legislated in pursuance of the power to regulate commerce, and a State exercised or granted an authority in derogation of the law, the act would be void. This had been established in the case of *Pennsylvania v. The Wheeling Bridge Co.*, with regard to the erection of a bridge, and the court adhered to the principle of that decision. But while the power lay dormant in Congress it would not preclude the exercise of a distinct and independent power by a State, or even of the power to regulate commerce in matters where the grant of that power to Congress was not exclusive. The case before the court was of the latter description.

The national government had no powers but such as had been delegated to it; the States all that had not been surrendered. The power to authorize the building of bridges was not to be found in the Federal Constitution. It was originally vested in the States, and had not been taken from them or conferred specifically on Congress. It must reside somewhere, and it followed that the States had it still. This power, like the police power and others that might be enumerated, might operate on the same subjects as the power to regulate commerce; but this was no reason for preventing its legitimate exercise. If it should be so used, openly or covertly, as to conflict with the Constitution or laws of the

United States, it would be the right and duty of the national judiciary to interpose with vigor and effect.

The case under consideration was identical as to the material facts with that of Blackbird Creek,<sup>1</sup> and there was no difference in principle. Both streams were affluents of the same larger river, and each was entirely within the State which authorized the obstruction. Though Blackbird Creek was the less important water, it was navigable, and the obstruction was complete. If the Schuylkill was larger and its commerce greater, the obstruction was only partial, and the public convenience to be promoted more imperative. The point that the effect was to exclude vessels duly licensed and enrolled as coasters from a navigable stream, was made by counsel in both cases; and though it was not noticed by the Chief-Justice in delivering judgment, his silence was equivalent to a denial of its relevancy. The judgment consequently established that there was no such legislation by Congress as to preclude the States, and the court could not, without overruling it, annul the law of Pennsylvania or direct the demolition of the bridge which the legislature of that State had authorized. There was the more reason for this conclusion because the bridges which are the connecting parts of highways are as essential to commercial intercourse as the waters which they cross; and as the traffic over them may be greater than that on the river, it is for the municipal authority to determine which is the more important and should be preferred. The possible abuse of a power is no proof that it does not exist; and where a river is, like the Schuylkill, wholly within the limits of a State, there is little danger that the power to bridge it will be abused, because the consequences will fall chiefly on her own citizens. Finally, Congress might, as in other cases where power was shared by the States, intervene to control local legislation and regulate all bridges over navigable streams, or provide for the removal of those which prejudicially affected navigation.

The case of *Gilman v. Philadelphia* was cited and approved in *Miller v. The Mayor of New York*;<sup>2</sup> and in *Escanaba v.*

<sup>1</sup> 2 Peters, 245.

<sup>2</sup> 109 U. S. 395.

Chicago<sup>1</sup> it was held to follow that in the absence of congressional legislation the State of Illinois had plenary power over the Chicago River, which flowed entirely within her borders, and might authorize the city of Chicago to build, repair, and regulate the bridges which were requisite to connect the streets.

It is obvious, under these decisions and on principle, that since bridges are parts of highways and essential to their completeness, and can seldom be built without to some extent impeding navigation, the government which has charge of the highways must determine the relative importance of the traffic on the bridge and that on the river which flows beneath, and so adjust the claims of both as to promote the interests of commerce and the community as a whole. This duty has always been performed by the States, and from the dual nature of our government necessarily devolves on them rather than the General Government; subject, nevertheless, to the authority of Congress over the waters of the United States, so far as they form by themselves, or by connection with other waters, a continuous channel for commerce.<sup>2</sup>

It is established under this decision that the police power of the States embraces the construction, repair, and maintenance of bridges, and the establishment of ferries within their limits, which, though subordinate to Congress, is yet plenary until Congress legislates.<sup>3</sup> Such a conclusion is not only reasonable, but in a sense necessary, because the local government can better determine what local needs require; and if such details must necessarily be referred to the General Government, it would fail in the performance of the task or want time for the consideration of matters which concern the nation as a whole.

Although the Schuylkill has its entire course in Pennsylvania, and the fact was adverted to by Swayne, J., as rendering the case identical with that of Blackbird Creek, his language

<sup>1</sup> 107 U. S. 687.

<sup>2</sup> The *Daniel Ball*, 10 Wallace, 557; *Escanaba v. Chicago*, 107 U. S. 685. See *Robbins v. Shelby District*, 120 Id. 489, 493.

<sup>3</sup> *Cardwell v. The Bridge Co.*, 113 U. S. 205, 208.

was broad enough to justify the inference that the power to build bridges is, like that to construct the highways which they connect, primarily in the States, subject to the controlling hand of Congress. Such, also, was the drift of the argument in *Escanaba v. Chicago*, although the conclusion was narrower than the premises, and confined to "bridges over navigable streams which are entirely within the limits of the State." The question raised in *The Wheeling Bridge Case* is, therefore, still at large, and should seemingly depend, not on whether the river flows through one or many States, but on how far it is navigable, the size and number of the vessels which pass up and down the channel, and the kind and value of their cargoes. If the regulation of the Schuylkill may safely be left to the local authorities, and the Hudson is exclusively under the control of Congress, it is not because the entire course of the former river is in the State of Pennsylvania, while the latter divides New York from New Jersey, but because the traffic on the Hudson much exceeds that on the Schuylkill. A river flowing through two or more States may be so far common property that no one of them can sanction any structure that will obstruct the channel; but if, as we may infer from *Gilman v. Philadelphia*, a State may bridge rivers which, like the Penobscot, are important avenues of commerce, because they are exclusively within her borders, there would seem to be no sufficient reason why New York and New Jersey should not unite in throwing a bridge across the Hudson. The test seemingly should be, Is the river of such importance to interstate and foreign commerce that it should be exclusively regulated by the General Government, and cannot safely be trusted to local legislation, subject to the intervention of Congress? and the question whether the entire course of the stream is in the State, is a circumstance that may deserve attentive consideration, but is not of itself conclusive. A river which has its source in one State and its mouth in another, is, so far as its course through the former is concerned, as entirely local as if it did not enter the latter; and the Hudson above Newburgh should therefore be as much under the control of New York as is the Schuylkill

of Pennsylvania, especially if the latter be viewed in its true aspect as a branch of the Delaware.

The question arose in *The People v. The Saratoga R. R. Co.*,<sup>1</sup> under an information filed by the Attorney-General of New York against the defendants for the erection of a bridge across the Hudson River from the city of Troy to a point on the opposite bank. The defendants relied on an authority from the legislature as a justification, and the plea was held valid on demurrer. The court said that the Hudson, from the ocean to the city of Troy, and above it as far as the village of Waterford, was an arm of the sea where the tide ebbed and flowed, and had long been used in carrying on commerce under the laws of the United States.

The place, therefore, was one where vessels registered and licensed as coasters under the act of Congress of February, 1793, had a right to pass, and where any obstruction entirely preventing or materially impeding navigation would be unlawful. The entire control over the waters of the States resided in Congress and the several States. This power was originally in the State legislatures, and had not been surrendered to Congress except so far as was necessary to secure a free navigation. A free navigation did not mean a navigation free from such obstacles and impediments as the best interests of society might demand. A vessel arriving at the port of New York from a foreign port, which had sailed and was navigated in pursuance of the laws passed by Congress, might be confronted at the quarantine ground, not by a bridge with a draw which could be passed in half an hour, but with a mandate from the State authorities requiring her to lie at anchor without communication with the shore for weeks, or, if the case required it, for a longer period. Yet no one contended that such detention was unconstitutional.

Chief-Justice Marshall had, on the contrary, enumerated quarantine laws and ferries as among the component parts of the mass of legislation that might be most advantageously exercised by the States. The word ferries was followed by an "etc.," implying that there were other subjects of a like kind ;

<sup>1</sup> 15 Wend. 113.

and nothing was more analogous to ferries than the bridges for which ferries were but substitutes. Sovereignty was divided between the States and the General Government; and as the right to build bridges was not delegated to the latter, nor denied to the former, it might be exercised by the State legislatures in any way that did not injuriously obstruct navigation. A bridge with a draw that might be opened free of expense for every passing vessel, fulfilled these conditions. It was held in the case of Blackbird Creek that the power of Congress had not been so exercised as to affect the question; and although it was not easy to see how that could be said of vessels navigating under a coasting license, if this was true of Blackbird Creek, the Hudson was indisputably a public navigable river, subject to the navigation laws of Congress. The defendants could not, therefore, have closed it by an impassable dam, but they might well construct a bridge with a draw, which facilitated intercourse by land without materially interfering with that which passed up and down the river.

We may infer from this decision, when read in connection with the language held in *Gilman v. Philadelphia*,<sup>1</sup> that the Federal courts should not enjoin a bridge which has been authorized by the State legislature, unless the injurious consequences to navigation are manifest and such as do not admit of the delay requisite for the intervention of Congress, which is the ultimate and appropriate tribunal for the decision of a question depending on circumstances that are beyond the scope of a judicial inquiry, and should be left to the legislature.

The power of Congress to regulate commerce, and the power of the President and Senate over the same subject-matter through the treaties made with foreign nations, may obviously clash; and it seems to be well settled that when such a result ensues, the act of Congress will, if subsequent, prevail. A treaty is a law, but it has, so far as the courts are concerned, no higher claim, and may as concluded by two branches of the government, have less weight than a statute

<sup>1</sup> 3 Wallace, 713, 726.

to which all have given their assent. It consequently falls within the rule that, as between two opposite enactments, that which is the latest declaration of the national will shall prevail.<sup>1</sup> Whether the compact is or is not broken by such a course, is a political question beyond the scope of the judiciary, and must be left to the other departments of the government for settlement by negotiation or through a recourse to arms.

<sup>1</sup> Head-money Cases, 112 U. S. 588, 599; *Chew Heong v. The United States*, Id. 536, 562; *Taylor v. Morton*, 2 Curtis, 454, 459.

## LECTURE XXIV.

Amendments to the Constitution. — The First Eleven intended to Limit the Powers of the Federal Government. — The Constitutional Prohibitions apply exclusively to the United States, unless they are so worded as to include the States. — A Prohibition addressed to the United States cannot be enforced as against the States, nor a Prohibition to the States as against Individuals. — The Police Power generally confined to the States, and insusceptible of being enforced or exercised by Congress. — The Fourteenth Amendment a restraint only on the States. — State Citizenship, and Citizenship of the United States. — The Fifteenth Amendment addressed to the States and the United States. — The Thirteenth binding on the United States, the States, and the People. — A Statute unconstitutional in any Part is void in all, unless what is valid can stand alone. — Civil Rights Bill. — What constitutes Involuntary Servitude.

THE Constitution of the United States was regarded by the statesmen who sat in the Federal Convention as so essentially limited as to require no express restraints beyond the few that were imposed in terms.<sup>1</sup> The powers which it gave, were confined to certain necessary objects, and therefore plenary so far as these were concerned; but they were to be exercised by a chief magistrate and representatives chosen by the people, who were not likely to deal hardly with their constituents, and who might be impeached while in office, and held to a strict account when their terms expired. The purpose, as declared in the preamble, was to secure the blessings of liberty to the people of the United States and their posterity; and it was inconceivable that an instrument planned for such an end would be employed as an engine of arbitrary power. It did not confer an absolute authority, and was, on the contrary, a grant of enumerated powers

<sup>1</sup> See The Federalist, art. 84; Story on the Constitution, sections 185, 206, 305, 1907.

which from their nature could not be used tyrannically to deprive any man of "life, liberty, or property." The entire judicial power was vested in a "supreme court and such inferior courts as Congress might from time to time establish," and to be administered by judges who were to hold office for life and to be removed only on impeachment; and were the legislature so disposed, no part of the power thus conferred could be taken from the judiciary and placed in tribunals constituted for the occasion, and composed of members appointed by the President as commander-in-chief, and liable to be dismissed at pleasure.

Such was the rule as explicitly laid down in the grant of judicial power;<sup>1</sup> and the authority to make regulations for the government of the land and naval forces, which constituted the sole exception, could only be exercised over persons who were mustered into the service of the United States. Nor was this all. It was expressly declared "that the trial of all crimes, except in cases of impeachment, shall be by jury," and Congress were forbidden to pass any bill of attainder or *ex-post facto* law, — which necessarily implied that they could not delegate the power so withheld, or authorize the trial, conviction, and punishment of citizens by military commissions proceeding arbitrarily according to a varying standard not previously defined by the statute or common law. It was not less inconceivable that such an authority could be conferred or exercised by the President. He is the high constable of the nation, whose duty it is to see that the laws are faithfully executed, and may perhaps direct the arrest of persons who are under grave suspicion of conspiracy or treason, in order that they may be brought before a magistrate for examination and commitment;<sup>2</sup> but he does not possess a ray of judicial power. Congress might declare war, and if they did the President would have a vast and somewhat undefined authority as commander-in-chief; but it did not then enter into the mind of any man that the power to conduct operations against a foreign or domestic enemy implied a power to

<sup>1</sup> American Insurance Co. v. Canter, 1 Peters, 511, 546.

<sup>2</sup> See Traugott Muller's Case, 5 Philad. 289, 291.

proceed hostilely against the citizen, to arrest and execute him, or to confiscate his land or goods. The writ of *habeas corpus* might, it was true, be suspended during insurrection or invasion ; but this simply allowed the detention of persons who had been arrested for treason or treasonable practices under a warrant signed by the President, the Secretary of State, or some other cabinet officer, until the case could be heard before a magistrate or jury consistently with the public safety. It did not justify illegal arrests, and still less the conviction of the accused without a trial in due course of law. Such is the theory and practice of the English government, and the framers of the Constitution certainly did not intend to introduce a new and arbitrary rule.<sup>1</sup> The people of the United States might therefore regard the Constitution which they were asked to adopt as a bulwark behind which they would be secure in their homes, their property, and their persons, — so far, at least, as those ills were concerned which government can cause or obviate.

If such was the opinion of Madison and Hamilton, there were others who thought differently, and, as the result has shown, with more reason. Power, so they argued, tends not only to increase in force and volume in its onward course, but to escape through unforeseen breaks and channels from the dikes by which it is confined. The restraints should therefore be so explicit that they cannot be misunderstood. Such a safeguard had been given in England by the Petition of Right, and Bill of Rights, and was embodied in the Constitutions of Pennsylvania, Virginia, and some of the other States ; and the want of it was a grave objection to the frame of government which the people were asked to adopt. These reasons were generally regarded as having so much weight that the Constitution would not have been ratified but for a tacit understanding that the defect should be remedied as soon as the new government went into operation. Such additional guaranties as were deemed requisite were accordingly proposed by Congress at their first session in 1789, and unanimously adopted by the States. These embodied

<sup>1</sup> See May, Constitutional History, ii. 269.

cardinal principles which the country viewed as essential to freedom, and erected into rules that were intended to be as obligatory on the various departments of the government as any law that Congress could enact would be on the people.

One of these guaranties is noteworthy from the importance of the principle, and the care with which it was enforced. Agreeably to the Constitution, Article III., Section 2, the trial of all crimes, except in cases of impeachment, shall be by jury, and such trials shall be had in the State where such crimes shall have been committed, — plain words, which might seem ample to convey the idea. But so earnest was the country on this head that the guaranty was reiterated in the amendments.

The Sixth Amendment is as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." By the Fifth Amendment "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or the militia when in actual service in time of war or public danger."

The friends of the Constitution doubtless believed that when the assurance given in the body of the instrument was thus corroborated by the amendments, the privilege of a trial by jury was placed on an impregnable basis, and viewed the persistent distrust of its opponents as fanciful or perverse; and yet could Patrick Henry have foreseen the opinion of Chief-Justice Chase in *Ex-parte* Milligan, and rehearsed it to the Virginia Convention, his disbelief in paper guaranties would have been confirmed, his predictions verified, and the new frame of government rejected without further debate.

The restraints imposed by the amendments, as adopted in 1789, were all intended to guard against an abuse of power on the part of the General Government and not on the part of individuals or of the States. The numerous associations which now exercise a despotic control in Europe and the

United States were then unknown, and it was supposed that the danger to the natural rights vindicated by the Declaration of Independence was solely from above. What the country apprehended was official tyranny and arbitrary legislation; and the prohibitory clauses were consequently addressed to the government, and not to individuals.<sup>1</sup> Such has been the view uniformly taken even when the language might seem to require a broader interpretation.<sup>2</sup> "No person," declares the Fifth Amendment, "shall be deprived of life, liberty, or property without due process of law." Here is a general injunction, seemingly laid on all the world, and binding every man not less than the community as an organic whole. Such probably would be the impression at first sight of most persons; and yet it is clear that the restraint is solely on the government. A different view would enable Congress to legislate for the prevention or redress of wrongs to life, liberty, or property on the part of individuals, contrary to the design which was to limit the powers of the United States.<sup>3</sup>

As what the people of the United States feared when the Constitution was adopted was that the new and unknown power which they were calling into existence might grow into a tyranny which would bear down every constitutional restraint, so secession gave birth to apprehensions of a different kind. If Jefferson taught that individuals had certain inalienable rights, he was not less strenuous in asserting the sovereignty of the States. North and South each adopted that part of his doctrines which suited their own views; and when the civil war came to an end it was apprehended that the South would make use of the remnants of State rights to re-establish the bondage which had been abolished by the logic

<sup>1</sup> *United States v. Cruikshank*, 92 U. S. 542; *The Civil Rights Cases*, 109 Id. 3, 17.

<sup>2</sup> *Barron v. The City of Baltimore*, 7 Peters, 243, 250; *Fox v. Ohio*, 5 Howard, 410; *Pervear v. The Commonwealth*, 5 Wallace, 475; *Twitcheil v. The Commonwealth*, 7 Id. 321; *Edwards v. Elliott*, 21 Id. 532; *United States v. Cruikshank*, 92 U. S. 542, 552.

<sup>3</sup> See *The Civil Rights Cases*, 109 U. S. 3; *United States v. Harris*, 106 Id. 629, 643.

of events, rather than from any settled wish or purpose of the people who had taken up arms to prevent the dismemberment of their country and maintain her laws. The Thirteenth, Fourteenth, and Fifteenth Amendments were accordingly formulated by Congress and adopted by the States under the pressure of the Reconstruction Acts, not so much from a desire to reduce the long-dormant theory of universal equality to practice,<sup>1</sup> as because it was supposed that the emancipation of the colored race would do away with the cause of offence which had endangered the Union, and by counterbalancing the white men in the seceding States with the negroes, prevent the South from casting a solid and preponderating vote in the choice of the President and of Congress.<sup>2</sup>

The limitations with which the Constitution, as thus amended, guards private and political rights and privileges against arbitrary deprivation by the States, by the United States, or by individuals, are as follows:—

- ✓ (1) "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances." (Amendments, Article I.)
- ✓ (2) "A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." (Amendments, Article II.)
- ✓ (3) "No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law." (Amendments, Article III.)
- ✓ (4) "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (Amendments, Article IV.)

<sup>1</sup> See the Dred Scott Case, 19 Howard, 393.

<sup>2</sup> See the Civil Rights Cases, 109 U. S. 3, 17.

✓ (5) "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." (Amendments, Article V.)

✓ (6) "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence." (Amendments, Article VI.)

✓ (7) "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." (Amendments, Article VII.)

✓ (8) "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (Amendments, Article VIII.)

✓ (9) "Powers not delegated to the United States by the Constitution, nor reserved by it to the States, are reserved to the States respectively or to the people."<sup>1</sup> (Amendments, Article X.)

✓ (10) "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of

<sup>1</sup> Though formally a reservation, this clause in effect forbids the United States to use any power which is not expressly or impliedly enumerated in the grant.

another State, or by citizens or subjects of any foreign State.” (Amendments, Article XI.)

✓ (11) “The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.” (Constitution, Article I., Section 9.)

(12) “No State shall make anything but gold and silver coin a legal tender in payment of debts, or pass any law impairing the obligation of contracts.” (Constitution, Article I., Section 10.)

(13) “The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.” (Constitution, Article IV., Section 2.)

(14) “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.” (Amendments, Article XIV.)

✓ (15) “The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.” (Amendments, Article XV.)

✓ (16) No bill of attainder or *ex-post facto* law shall be passed. (Constitution, Article I., Section 9, Article X.)

✓ (17) “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.” (Amendments, Article XIII.)

The prohibitions in the above enumeration, down to the Eleventh, inclusive, apply only to the United States; the three next only to the States; the Fifteenth and Sixteenth are obligatory both on the States and on the United States; while the Seventeenth and last binds the States and the

United States and the people, and is violated whenever any man is held in bondage, whether the restraint is imposed by virtue of a law or custom, or is simply the wrongful act of an individual.

No constitutional prohibition is more important than those which concern the rights incident to citizenship and protect them from legislative aggression. In declaring that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, the Constitution impliedly forbids any legislation tending to invalidate the right which it confers; but the precise import of the article is by no means clear, and it may be viewed as guaranteeing all the rights which citizenship ought to confer, or those only which it does confer according to the laws of the State where the question arises. Agreeably to the definition given in *Corfield v. Coryell*,<sup>1</sup> and cited with approval in the *Slaughter-house Cases*,<sup>2</sup> "The privileges and immunities of the citizens of the several States are . . . those privileges which are in their nature fundamental, which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States which compose the Union from the time of their becoming free, independent, and sovereign. The court, therefore, could not accede to the proposition that under this provision of the Constitution the citizens of the several States are permitted to participate in all the rights which belong exclusively to the citizens of any other particular State, merely upon the ground that they are enjoyed by its citizens, much less that in regulating the use of the common property of the citizens of such State the legislature is bound to extend to the citizens of all other States the same advantages as are secured to their own citizens." It followed that New Jersey might well forbid "any person who was not at the time an actual inhabitant and resident of this State to gather oysters in any of the rivers, bays, or waters of the State, on board of any vessel not wholly owned by some person inhabitant of or actually residing in this State." The *jus publicum* to use the navigable

<sup>1</sup> 4 Wash. C. C. 371.

<sup>2</sup> 16 Wallace, 36, 76, 97.

waters of the State was subject by the Constitution of the United States to the exclusive regulation of Congress; the *jus privatum* to the underlying ground, remained in the State and was the common property of her citizens, and might be disposed of as she thought proper. On the other hand, what the article under consideration secures to the citizens of each State in the several States, according to the view taken in *Paul v. Virginia*,<sup>1</sup> is, "those privileges and immunities which are common to the citizens in the latter State under their Constitution and laws by virtue of their being citizens." So in the Slaughter-house Cases,<sup>2</sup> the court said that the clause in question did not create those rights which it called privileges and immunities of citizens of the State. It threw around them in that clause no security for the citizen of the State in which they were claimed. "Its sole purpose was to declare to the several States that whatever those rights, as you grant or establish to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the right of citizens of other States within your jurisdiction."

Both views obviously cannot be correct, and the weight of authority would seem to be in accordance with the latter, — that the clause in question adds nothing to the rights given and restraints laid by the other articles of the Constitution, except that the rules made by each State with regard to the citizens of her sister States must be the same as those which she imposes on her own citizens.<sup>3</sup> In *McCready v. Virginia*,<sup>4</sup> the question which arose in *Corfield v. Coryell* was put on its true ground, — that the land under the navigable waters of a State is public property, and may be disposed of as the legislature think proper; and it was held to follow that Virginia might confine the right of planting oysters in the streams of that State within the ebb and flow of the tide to

<sup>1</sup> 8 Wallace, 168.

<sup>2</sup> 16 Wallace, 36, 37.

<sup>3</sup> See *Ward v. Maryland*, 12 Wallace, 418; *ante*, p. 276; *United States v. Harris*, 106 U. S. 629, 643; *Hurtado v. California*, 110 Id. 516, 533.

<sup>4</sup> 94 U. S. 394.

her own citizens, subject to the paramount right of the United States to regulate navigation.<sup>1</sup>

<sup>1</sup> "The principle has long been settled in this court that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. *Pollard's Lessee v. Hagan*, 3 Howard, 212, *Smith v. Maryland*, 18 Id. 72; *Mumford v. Wardwell*, 6 Wallace, 423; *Weber v. Harbor Commissioners*, 18 Id. 57. In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. *Martin v. Waddell*, 16 Peters, 367. The title thus held is subject to the paramount right of navigation, the regulation of which in respect to foreign and interstate commerce has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property-right, and not a mere privilege or immunity of citizenship.

"By Art. IV., Sect. 2, of the Constitution the citizens of each State are 'entitled to all privileges and immunities of citizens in the several States.' Mr. Justice Washington, in *Corfield v. Coryell*, 4 Wash. C. C. 371, thought that this provision extended 'only to such privileges and immunities as are in their nature fundamental, which belong of right to the citizens of all free governments.' And Mr. Justice Curtis, in *Scott v. Sanford*, 19 Howard, 393, described them as such 'as belonged to general citizenship.' But usually when this provision of the Constitution has been under consideration, the courts have manifested the disposition which this court did in *Conner v. Elliott*, 18 Howard, 591, 'not to attempt to define the words, but rather to leave their meaning to be determined in each case upon a view of the particular rights asserted or denied therein.' This clearly is the safer course to pursue when, to use the language of Mr. Justice Curtis in *Conner v. Elliott*, 'we are dealing with so broad a provision, involving matters not only of great delicacy and importance, but which are of such a character that any merely abstract definition could scarcely be correct, and a failure to make it so would certainly produce mischief.'

"Following, then, this salutary rule, and looking only to the particular right which is here asserted, we think we may safely hold that the citizens of one State are not invested by this clause of the Constitution with

Agreeably to *Walker v. Sauvinet*,<sup>1</sup> as cited and approved in *Hurtado v. California*,<sup>2</sup> "A trial by jury in suits at common law pending in State courts is not, therefore, a privilege or immunity of national citizenship which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. 'Due process of law' is process according to the law of the land. This process in the States is regulated by the law of the State." It seems from these decisions that trial by jury, even in criminal cases, is not guaranteed as against the States either by the Fourteenth Amendment or the provision that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," and may, on the contrary, be given or withheld by each State at pleasure.

Corporations chartered by other States are not within the scope of the clause which entitles the citizen of each State to the privileges and immunities of citizens of the several States, and may consequently be denied the right to transact

any interest in the common property of the citizens of another State. If Virginia had by law provided for the sale of its once vast public domain and a division of the proceeds among its own people, no one, we venture to say, would contend that the citizens of other States had a constitutional right to the enjoyment of the privilege of the people of Virginian citizenship. Neither if, instead of selling, the State had appropriated the same property to be used as a common by its people for the purposes of agriculture, could the citizens of other States avail themselves of such a privilege. And the reason is obvious: the right thus granted is not a privilege or immunity of general, but of special citizenship. It does not 'belong of right to the citizens of all free governments, but only to the citizens of Virginia, on account of the peculiar circumstances in which they are placed. They, and they alone, owned the property to be sold or used; and they alone had the power to dispose of it as they saw fit. They owned it not by virtue of citizenship merely, but of citizenship and domicile united; that is to say, by virtue of citizenship confined to that particular locality.'" *McCready v. Virginia*, 94 U. S. 394.

<sup>1</sup> 92 U. S. 90.

<sup>2</sup> 110 U. S. 516, 533.

business within the State, or admitted on such terms as she prescribes ; as, for instance, the payment of a license fee not exacted from companies incorporated by the State, or an unequal tax.<sup>1</sup> The terms and conditions so imposed must not, however, be repugnant to the Constitution of the United States, or inconsistent with any right secured by that instrument.<sup>2</sup> A stipulation that the company shall not remove any suit brought against them into the Circuit Court of the United States will therefore be merely void.<sup>3</sup> In like manner, a State cannot preclude a foreign corporation from making contracts or transacting business within her limits which appertain to foreign or interstate commerce.<sup>4</sup> Companies chartered by the State are persons relatively to her, and she can no more deny them the equal protection of the laws, or subject them to unequal taxation, than she can natural persons ;<sup>5</sup> but the rule does not apply to foreign corporations, though doing business within the State which imposes the tax under a license from her.<sup>6</sup>

Agreeably to the Dred Scott case, a man of African descent was not, and could not be, a citizen of a State, or of the United States, in the sense in which the term is used in the Fourth Article, and generally in the Constitution. Citizenship could only be acquired through the act of Congress, which confined naturalization to white men, or under the laws and customs of the several States which, with few exceptions, denied colored men the suffrage and the right to intermarry, or even to eat at the same table with whites. And no man who was not a citizen of the State in which he was born or domiciled

<sup>1</sup> *Paul v. Virginia*, 8 Wallace, 168 ; *Ducat v. Chicago*, 10 Id. 410 ; *Insurance Co. v. Morse*, 20 Id. 445 ; *Philadelphia Fire Association v. New York*, 119 U. S. 110 ; *Doyle v. Continental Insurance Co.*, 94 Id. 535 ; see *ante*, pp. 276, 458.

<sup>2</sup> *Insurance Co. v. Morse*, 20 Wallace, 445.

<sup>3</sup> *Insurance Co. v. Morse*, 20 Wallace, 445 ; *Philadelphia Fire Association v. New York*, 119 U. S. 110, 125.

<sup>4</sup> *Manuf. Co. v. Ferguson*, 113 U. S. 727 ; *Philadelphia Fire Association v. New York*, 119 U. S. 110, 120 ; see *ante*, p. 458.

<sup>5</sup> *Santa Clara County v. Southern Pacific R. R. Co.*, 118 U. S. 394.

<sup>6</sup> *Philadelphia Fire Association v. New York*, 119 U. S. 110.

could claim the privileges and immunities of citizenship in any other.<sup>1</sup> A negro might proceed in the federal tribunals when the controversy arose under the Constitution or laws of the United States, but they could not entertain his suit on the ground of citizenship. A radical change was made by the Fourteenth Amendment, which is as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The main object of this amendment is clear. It was to render all persons born or naturalized in the United States, and especially the recently emancipated negroes, citizens of the United States and of the State wherein they reside, endowed with the rights incident to that twofold relation, including those conferred by the second section of the Fourth Article, and also to afford the possessors of such citizenship an effectual guaranty against arbitrary or unequal legislation on the part of the several States.

Citizenship is thus made independent of the volition of the States; and wherever a man born or naturalized in the United States goes within the limits of the Union, he will be guarded by the Constitution and secure of the privileges and immunities conferred by the local law on the citizens of that place, as well as of those of a citizen of the United States.<sup>2</sup>

<sup>1</sup> See the Slaughter-house Cases, 16 Wallace, 36, 72.

<sup>2</sup> See the Slaughter-house Cases, 16 Wallace, 36, 81, 112.

"The first section of the Fourteenth Article, to which our attention is more specially invited, opens with a definition of citizenship, — not only citizenship of the United States, but citizenship of the States. No such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress. It had been the occasion of much discussion in the courts, by the executive departments, and in the public journals. It had been said by eminent judges that no man was a citizen of the United States except as he was a citizen of one of the

What the privileges and immunities of a citizen of the United States are, has been variously considered and never definitely ascertained; but it may be said, in general, that

States composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens. Whether this proposition was sound or not, had never been judicially decided. But it had been held by this court, in the celebrated Dred Scott case, only a few years before the outbreak of the civil war, that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen were still not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution. To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a State, the first clause of the first section was framed: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.' The first observation we have to make on this clause is, that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the Dred Scott decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro, can admit of no doubt. The phrase, 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States. The next observation is more important in view of the arguments of counsel in the present case. It is, that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it; but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union. It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual." *Slaughter-house Cases*, 16 Wallace, 36, 72.

they include whatever the Constitution expressly or impliedly confers, and nothing that it does not grant. They do not, therefore, include the natural rights which, though recognized by the Constitution and guaranteed against the States or the General Government, existed before it was framed, and would subsist if it were dissolved ; as, for instance, the freedom of speech and of the press and the right to bear arms, and to assemble for any lawful purpose.<sup>1</sup> They do include the rights which are essential to the relations of the people as citizens of the United States to the government and to each other as natives of the same country ; and among them that of assembling to petition Congress for a redress of grievances, and of passing freely through the States, or from State to State, for the transaction of business or any other lawful purpose, and also of making their abode in any State under the equal protection of its laws.<sup>2</sup> And as these rights are conferred affirmatively on the people, and not merely guarded against the States, Congress may provide for rendering them effectual and punishing any person by whom they are violated.<sup>3</sup> Since, moreover, the Constitution is paramount, and nothing which it gives can be impaired by local legislation, so much of the Fourteenth Amendment as forbids the States to impair the privileges and immunities of citizens of the United States may be regarded as superfluous, and would have been implied had it not been expressed.

Among the privileges of national citizenship none is more important than that of acquiring by residence in a State the right to participate in the election of members of the House of Representatives, subject to such qualifications as the State imposes on her citizens. This results from the character of the government, as republican and representative, from the Fourteenth Amendment, and from the First Article of the Constitution, Sections 2, 3, and 4, which declare, —

<sup>1</sup> *United States v. Cruikshank*, 92 U. S. 542, 550; *Presser v. Illinois*, 16 Id. 252, 266; *Permoli v. First Municipality*, 3 Howard, 589.

<sup>2</sup> See *Crandall v. Nevada*, 6 Wallace, 35; *Presser v. Illinois*, 116 U. S. 252, 267; *United States v. Cruikshank*, 92 Id. 542; *The Slaughter-house Cases*, 16 Wallace, 36, 75, 79, 91, 109; *ante*, p. 471.

<sup>3</sup> See *United States v. Cruikshank*, 92 U. S. 542.

"The house of representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature." Article I., Sect. 2.

"The Senate of the United States shall be composed of two senators from each State, chosen by the legislature thereof, for six years; and each senator shall have one vote." Article I., Sect. 3.

"The times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing senators." Article I., Sect. 4.

Congress may make regulations by virtue of the power thus conferred, or adopt those made by the State in which the election is held, and provide for the punishment of every person by whom they are violated. If the latter course be adopted, the State election officers become officers of the General Government and answerable to both masters if they are remiss or fraudulent in the performance of a duty which concerns the States and the nation.<sup>1</sup>

<sup>1</sup> *Ex parte Siebold*, 100 U. S. 371, 388; *Ex parte Yarbrough*, 110 Id. 651. "The objection that the laws and regulations, the violation of which is made punishable by the acts of Congress, are State laws and have not been adopted by Congress, is no sufficient answer to the power of Congress to impose punishment. It is true that Congress has not deemed it necessary to interfere with the duties of the ordinary officers of election, but has been content to leave them as prescribed by State laws. It has only created additional sanctions for their performance, and provided means of supervision in order more effectually to secure such performance. The imposition of punishment implies a prohibition of the act punished. The State laws which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress. It simply demands their fulfilment. Content to leave the laws as they are, it is not content with the means provided for their enforcement. It provides additional means for that purpose; and we think it is entirely within its constitutional power to do so. It is simply the exercise of the power to make additional regulations.

"Another objection made is, that if Congress can impose penalties

By an anomaly arising from the dual nature of our government, national citizenship does not confer the right to take part in the election of the members of the Federal House of Representatives, of the legislatures who choose the Senate of the United States, or of the electors who cast the vote for President; and the right of suffrage for such purposes may be given or withheld by the States at their pleasure, so long as the rule is uniform, and no person is excluded on account of race or color. There is this distinction, that while the United States, as we have seen, may regulate and supervise the election of the lower House of Congress, they have no such power as regards the choice of the State legislatures and electoral colleges, and cannot intervene for the prevention of fraud or violence, save perchance to secure the equal admission of colored citizens to the polls.<sup>1</sup>

On the other hand, the Second Amendment, which declares, "A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed," neither confers the right so guaranteed nor lays any restraint on the States. They may make any regulation which does not impair the prerogative of the General Government to call forth all citizens capable of bearing arms for the public defence, or disable the people from performing their duty in response to such a behest.<sup>2</sup> So the right voluntarily to associate as a military company or organization, or to drill and parade with arms, is not an for violation of State laws, the officers will be made liable to double punishment for delinquency,—at the suit of the State, and at the suit of the United States. But the answer to this is, that each government punishes for violation of duty to itself only. Where a person owes a duty to two sovereigns, he is amenable to both for its performance, and either may call him to account. Whether punishment inflicted by one can be pleaded in bar to a charge by the other for the same identical act, need not now be decided, although considerable discussion bearing upon the subject has taken place in this court, tending to the conclusion that such a plea cannot be sustained."

<sup>1</sup> United States v. Cruikshank, 92 U. S. 548; Minor v. Happerstett, 21 Wallace, 162; Pomeroy on Constitutional Law, sections 204-210. But see *Ex parte Yarbrough*, 110 U. S. 651.

<sup>2</sup> Presser v. Illinois, 116 U. S. 252, 263.

attribute of national citizenship, but may be regulated by each State and forbidden to any company or body of men who are not duly organized for that end, according to her laws or those passed by Congress under the power to provide for organizing, arming, and disciplining the militia. Such a conclusion is the more necessary because the authority of the General Government in this behalf is so limited as to be practically a dead letter; and if it were held to be exclusive of the States, an important arm of national defence and for the suppression of riot and insurrection would be impotent.<sup>1</sup>

In like manner, if the right to practise law in a State court has any relation to citizenship, it is to citizenship of the State in which the claimant resides; and he must therefore seek for redress in her tribunals, and not in those of the General Government.<sup>2</sup>

The prohibitory articles of the Constitution were critically considered by Chief-Justice Waite in *The United States v. Cruikshank*<sup>3</sup> in an opinion which gives a clear and consistent view of their operation on the United States, the States, and the people, and defines the limits within which they may be enforced by Congress. The case arose out of an indictment containing numerous counts, drawn under a statute which was held to be invalid because the clauses relied on for its support simply disable the States or the General Government, without imposing any duty or restraint on individuals, and consequently do not afford a ground for penal legislation.<sup>4</sup>

<sup>1</sup> *Presser v. Illinois*, 116 U. S. 252, 267.

<sup>2</sup> *Bradwell v. The State*, 16 Wallace, 130.

<sup>3</sup> 92 U. S. 542.

<sup>4</sup> "The first and ninth counts state the intent of the defendants to have been to hinder and prevent the citizens named in the free exercise and enjoyment of their 'lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceful and lawful purpose.' The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact it is, and always has been, one of the attributes of citizenship under a free government. It 'derives its source,' to use the language of Chief-Justice Marshall in *Gibbons v. Ogden*, 9 Wheaton, 119, 211, 'from those laws whose authority is acknowledged by civilized man throughout the world.' It is found wherever

There is a seeming exception to this rule. Although the Fifteenth Amendment is prohibitory that the right of citizens

civilization exists. It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection. As no direct power over it was granted to Congress, it remains, according to the ruling in *Gibbons v. Ogden*, Id. 203, subject to State jurisdiction. Only such existing rights were committed by the people to the protection of Congress as came within the general scope of the authority granted to the national government. . . .

"The First Amendment assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment, neither was its continuance guaranteed, except as against Congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States.

"The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the national government, is an attribute of national citizenship, and as such under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute and within the scope of the sovereignty of the United States. Such, however, is not the case. The offence as stated in the indictment will be made out if it be shown that the object of the conspiracy was to prevent a meeting for any lawful purpose whatever.

"The second and tenth counts are equally defective. The right there specified is that of 'bearing arms for a lawful purpose.' This is not a right granted by the Constitution, neither is it in any manner dependent upon that instrument for its existence. The Second Amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection, against any violation by their fellow-citizens of the rights it recognizes, to what is called in *The City of New York v. Miln*, 11 Peters, 102, the 'powers which relate to merely municipal legislation, or what was perhaps more properly called internal police,' 'not surrendered or restrained' by the Constitution of the United States.

of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude, it may incidentally confer the suffrage by compelling the States to choose between excluding white men from the polls and admitting negroes, and striking the word "white" from the laws by which the right of voting was regulated.<sup>1</sup>

It has also been decided that since it is only when a vote is rejected because of race, color, or previous condition of servitude that the offence is within the jurisdiction of the United States, and punishable by virtue of the Fifteenth Amendment, a statute which makes any wrongful rejection of a vote penal, without regard to the cause, is *ultra vires*, and a conviction under it must be set aside.<sup>2</sup> While, therefore, Congress may provide appropriate penalties for wilfully excluding a citizen from the polls on account of his color or descent, the indictment will fail unless the offence is specifically set forth; and an allegation that the voter was a negro, and illegally shut out, is not enough.<sup>3</sup>

"The third and eleventh counts are even more objectionable. They charge the intent to have been to deprive the citizens named, they being in Louisiana, 'of their respective several lives and liberty of person without due process of law.' This is nothing else than alleging a conspiracy to falsely imprison or murder citizens of the United States being within the territorial jurisdiction of the State of Louisiana. The rights of life and personal liberty are natural rights of man. 'To secure these rights,' says the Declaration of Independence, 'governments are instituted among men, deriving their just powers from the consent of the governed.' The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these 'unalienable rights with which they were endowed by their Creator.' Sovereignty for this purpose rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself." *United States v. Cruikshank*, 92 U. S. 542, 551, 555.

<sup>1</sup> *Neal v. Delaware*, 103 U. S. 370, 389; *Ex parte Yarbrough*, 110 Id. 651.

<sup>2</sup> *United States v. Reese*, 92 U. S. 214.

<sup>3</sup> The point was decided in *United States v. Cruikshank*, 92 U. S.

It follows on like grounds that an Act of Congress rendering it penal for two or more persons "to go in disguise on

542, 548, where Waite, C.-J., held the following language in giving judgment: "The sixth and fourteenth counts state the intent of the defendants to have been to hinder and prevent the citizens named, being of African descent and colored, 'in the free exercise and enjoyment of their several and respective right and privilege to vote at any election to be thereafter by law had and held by the people in and of the said State of Louisiana, or by the people of and in the parish of Grant aforesaid.' In *Minor v. Happerstett*, 21 Wallace, 178, we decided that the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the States. In *United States v. Reese*, 92 U. S. 214, we hold that the Fifteenth Amendment has invested the citizens of the United States with a new constitutional right, which is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship, but that exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been.

"Inasmuch, therefore, as it does not appear in these counts that the intent of the defendants was to prevent these parties from exercising their right to vote on account of their race, etc., it does not appear that it was their intent to interfere with any right granted or secured by the Constitution or laws of the United States. We may suspect that race was the cause of the hostility, but it is not so averred. This is material to a description of the substance of the offence, and cannot be supplied by implication. Everything essential must be charged positively, and not inferentially. The defect here is not in form, but in substance.

"We have in our political system a government of the United States, and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights within its jurisdiction it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State; but his rights of citizenship under one of these governments will be different from those he has under the other. *Slaughterhouse Cases*, 16 Wallace, 74.

"Citizens are the members of the political community to which they belong. They are the people who compose the community, and who in their associated capacity have established or submitted themselves to the dominion of a government for the promotion of their general welfare and

the highway" for the purpose of depriving any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, cannot be sustained under the Fourteenth Amendment, because it relates solely to the acts of individuals, without reference to the laws of the State where the offence is alleged to have been committed, or their administration. If the prohibition of slavery and involuntary servitude in the Thirteenth Amendment is a restraint on private persons as well as on the States and their officers, it will not help the case or sustain a statute which is broad enough to "cover any conspiracy between two white men against another free white man, to deprive him of any right accorded him by the laws of the State or the United States. A law under which two or more white persons may be punished for conspiracy or going about in disguise for the purpose of depriving another free white citizen of a right accorded by the law of the State to all classes of persons, — as, for instance, to make a contract, to bring a suit, or to give evidence, — clearly cannot be authorized by an amendment which simply prohibits slavery and involuntary servitude."<sup>1</sup>

The conclusion is indisputable; but it is not easy to see why the statute should have been treated as unconstitutional because it was not limited to conspiracies against negroes. Men of all races are equally entitled to the protection of the Thirteenth Amendment, and any act which tends to contravene its provisions is equally an offence, whether it is committed by a white man with a view to enslave negroes, or with a like intent as to men of his own race.

If the interpretation put in the *United States v. Cruikshank* the protection of their individual as well as their collective rights. In the formation of a government the people may confer upon it such powers as they choose. The government when so formed may, and when called upon should, exercise all the powers it has for the protection of the rights of citizens and the people within its jurisdiction; but it can exercise no other. The duty of a government to afford protection is limited always by the power it possesses for that purpose."

<sup>1</sup> *United States v. Harris*, 106 U. S. 629, 641.

on the Thirteenth, Fourteenth, and Fifteenth Amendments was entirely just, it did not give sufficient weight to the body of the instrument (Constitution, Article I., sections 2, 3, and 4). The error, if such it was, was rectified in *Ex parte Yarbrough*,<sup>1</sup> where the course of decision underwent a change, and it was held that since the qualification for the exercise of the suffrage in the choice of members of the House of Representatives is defined by the Constitution, and Congress may prescribe the time, place, and manner of holding the election, they may make such regulations as are necessary to guard it from fraud and violence, and punish the persons by whom they are disregarded. It followed that an indictment and conviction might be sustained for a conspiracy to threaten and intimidate a negro in the exercise and enjoyment of the right and privilege of suffrage in the election of a member of Congress of the United States; and the reasoning of the court would have led to a like conclusion had the party injured been a white man. The court said that wherever a duty was essential to the maintenance and operation of the government, Congress had an implied power to protect the persons charged with its fulfilment. The language of the Constitution is: "The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature." Such is the second section of the First Article, and the fourth section declares: "The times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time make or alter such regulations except as to the places of choosing senators." Congress passed an act compelling both branches of the State legislatures to meet in convention, and fixing the day when this should be done, and requiring them so to meet every day thereafter, and vote for a senator until one was elected.

In like manner, Congress had fixed a day, which was to be

<sup>1</sup> 110 U. S. 651.

the same in all the States, when the electors for President and Vice-President shall be appointed. So also the elections for members for the House of Representatives were by another act of Congress to be held on the Tuesday after the first Monday in November of 1876, and on the same day of every second year thereafter. Miller, J., said in delivering judgment: "Will it be denied that it is in the power of that body to provide laws for the proper conduct of those elections, — to provide, if necessary, the officers who shall conduct them and make return of the result; and especially to provide, in an election held under its own authority, for security of life and limb to the voter while in the exercise of this function? Can it be doubted that Congress can by law protect the act of voting, the place where it is done, and the man who votes, from personal violence or intimidation, and the election itself from corruption and fraud?"

"If this be so, — and it is not doubted, — are such powers annulled because an election for State officers is held at the same time and place? Is it any less important that the election of members of Congress should be the free choice of all the electors because State officers are to be elected at the same time?"

"These questions answer themselves; and it is only because the Congress of the United States, through long habit and long years of forbearance, has, in deference and respect to the States, refrained from the exercise of these powers that they are now doubted. But when, in the pursuance of a new demand for action, that body — as it did in the cases just enumerated — finds it necessary to make additional laws for the free, the pure, and the safe exercise of this right of voting, they stand upon the same ground and are to be upheld for the same reasons."

It may be inferred from this decision that Congress may regulate the election of the electoral colleges and State legislatures, because the former choose the President and the latter the Senators of the United States, and the duty which the voter performs in casting his ballot in either case concerns the General Government as well as the State. Such

a conclusion may be logical, but was seemingly not anticipated by the framers of the Constitution or the convention which ratified it.

It might be inferred from the language held in *United States v. Cruikshank*, and in the *Slaughter-house Cases*,<sup>1</sup> that a man may be a citizen of a State, although he is not a citizen of the United States; or, in other words, that a State may confer the privileges of citizenship, including the right to take part in the election of the President and Congress, on persons who have not been born in or naturalized by the United States. If such is the rule, while the Fifteenth Amendment declares that citizens of the United States shall be citizens of the State in which they reside, the States may confer the most important privilege of national citizenship upon persons who are not citizens of the United States, and endow aliens with the sovereign right of determining who shall be the officers of the federal government and frame its laws. The better opinion would, however, seem to be that the power of Congress to establish a "uniform rule of naturalization" covers the entire ground, and precludes the States from conferring the suffrage on persons who are not citizens of the United States, with the effect of enabling them to control those who are. The opposite view leads to an incongruous result. The United States may naturalize, but cannot confer the suffrage; the States cannot naturalize, but may confer the suffrage on persons whom the United States decline to admit or recognize as citizens. The States, consequently, have the upper hand, because the right to vote involves the power to govern; and an alien who has it stands at a higher level than a citizen from whom it is withheld. Reading the Constitution in the light of the Fifteenth Amendment, the just inference would seem to be that national citizenship is a prerequisite to the right of suffrage, and that every person who has it is a citizen of the State in which he makes his abode.

A law going beyond the pale of the Constitution and forbidding acts which Congress cannot control or punish, is not

<sup>1</sup> *Ante*, pp. 518, 523.

less invalid because it also covers acts that are under the control of Congress. To warrant the judicial reformation of a statute by striking out the defective part, what remains must be so entirely distinct as to render it clear that the legislature would have passed the law in its altered form.<sup>1</sup> And as the powers which are not enumerated in the instrument are reserved by the Tenth Amendment to the States or to the people, no law for the protection of health, of property, of order, or for the regulation of the purely internal commerce of a State, or of any contract which is not commercial, can, speaking generally, be passed by Congress.<sup>2</sup> There is, consequently, for the first time in the history of mankind, a law made by the people for the government which is not less positive than the laws which the government makes for the people; and if Congress or the President transgress the bounds it imposes, redress may be afforded by the State and federal tribunals, and in the last resort by the Supreme Court of the United States.<sup>3</sup> Such a conception may no doubt be found in the constitutional history of other countries, and notably of England; <sup>4</sup> but the restraints imposed by Magna Charta and the Petition of Right were on the prerogative, and King, Lords, and Commons collectively are absolute, or held in check only by precedents and principles. A student of the American Constitution must consequently consider not only what it authorizes, but what it forbids; and the latter inquiry is the more difficult because it involves the complex relations of the States and the General Government.

In interpreting the prohibitory as well as the enabling clauses of the instrument, recourse may be had to English history and jurisprudence to ascertain the purpose for which

<sup>1</sup> *United States v. Reese*, 92 U. S. 214; *United States v. Cruikshank*, 92 Id. 542; *ante*, p. 442.

<sup>2</sup> *Ante*, pp. 437, 439. See *Gibbons v. Ogden*, 9 Wheaton, 203; *Butchers' Association v. Crescent City*, 16 Wallace, 42; *Munn v. Illinois*, 94 U. S. 113.

<sup>3</sup> *United States v. Harris*, 106 U. S. 629; *United States v. Cruikshank*, 92 Id. 542; *Civil Rights Cases*, 109 Id. 13.

<sup>4</sup> *Ante*, p. 135.

they were framed and the meaning of the terms employed.<sup>1</sup> What was generally accepted in England as consonant with the common law, will not be presumed to have been forbidden by the framers of the American Constitution;<sup>2</sup> and the mischiefs which they designed to guard against are in the main those which the English race on both sides of the Atlantic deplored and endeavored to correct. The meaning of "due process of law," as used in the Fifth Amendment, and of the "law of the land," which is its equivalent in many of the State Constitutions, must be sought in the story of the Great Charter, and the grants by which it was supplemented.<sup>3</sup>

The battle with the prerogative under Charles I., including the resolutions of the "Commons" and the conference with the "Lords which preceded the passage of the Petition of Rights,"<sup>4</sup> and the abuse of general warrants in the succeeding century, must be studied if we would fully understand the care with which unreasonable searches and seizures, and arrests without the name and cause definitely assigned in the writ, are forbidden by the Amendments.<sup>5</sup> So the clause which, in conditionally forbidding, allows the suspension of the writ of *habeas corpus*, would be unintelligible without a knowledge of the principles and practice of the English government; and when viewed in this light will be found not to authorize arbitrary arrests or have any relation to martial law, but simply to suspend the means through which the accused may secure a prompt hearing and trial, with perhaps an implied right on the part of Congress to grant an indemnity for arrests made on charges of treason, conspiracy, or other offences punishable under the statutes of the United States,

<sup>1</sup> *Kring v. Missouri*, 107 U. S. 221, 229; *Green v. Shumway*, 39 N. Y. 418, 421; *Ex parte Wilson*, 114 U. S. 417; *Mackin v. United States*, 117 Id. 348; see *Kilbourn v. Thompson*, 103 Id. 168, 181, 201; *Dunn v. Anderson*, 6 Wheaton, 204.

<sup>2</sup> See *Munn v. Illinois*, 94 U. S. 113; *The Slaughter-house Cases*, 18 Wallace, 37, 102.

<sup>3</sup> See *Palairot's Appeal*, 67 Pa. 479.

<sup>4</sup> 1 *Rushworth*, 502, 513, 528 (London, 1721).

<sup>5</sup> *Boyd v. United States*, 116 U. S. 616, 625.

and set forth in the writ, but without the probable cause required by the common law.<sup>1</sup>

The powers bestowed on the United States are actual or potential restraints on the States,—actual when they are exclusive, potential when they are not; because Congress may so exercise them as to preclude the State governments.<sup>2</sup> The power to regulate interstate commerce belongs to the former class; the power to establish a uniform system of bankruptcy, to the latter. A State bankrupt law may therefore be valid as to future contracts so long as Congress refrain from acting, but will be suspended if such a law is passed by Congress.

It is not less clear that the prohibitory clauses of the Constitution apply exclusively to the United States, unless the States are named, or from the nature of the prohibition it manifestly applies to them.<sup>3</sup> This results from the general rule that instruments are to be construed relatively to the subject-matter; and as the object of the Constitution was the establishment and regulation of the federal government, nothing that it contains operates on the State governments unless the intention is expressly declared or appears by a plain implication. Broad, for instance, as are the terms of the Fifth Amendment, that no persons shall be deprived of "life, liberty, or property without due process of law," it is limited to the United States; and until the guaranty was so enlarged by the Fourteenth Amendment as to include the States, the federal tribunals could not afford redress for a violation of the venerable rule of Magna Charta by State legislation. "The first amendment to the Constitution," said Waite, C.-J., in *United States v. Cruikshank*, "prohibits Con-

<sup>1</sup> See Pomeroy, *Constitutional Law*, sections 707, 708.

<sup>2</sup> *Ante*, p. 97.

<sup>3</sup> *Barron v. The Mayor*, 7 Peters, 243; *Livingston v. Moore*, Id. 551; *Fox v. Ohio*, 5 Howard, 434; *Smith v. Maryland*, 18 Id. 71; *Withers v. Buckley*, 20 Id. 84; *Pervear v. The Commonwealth*, 5 Wallace, 476; *Twitchell v. The Commonwealth*, 7 Id. 321; *United States v. Cruikshank*, 92 U. S. 542; *Presser v. Illinois*, 116 Id. 252, 265; *Barker v. The People*, 3 Cowen, 686; *James v. The Commonwealth*, 12 S. & R. 221; *The Commonwealth v. Hitchings*, 5 Gray, 482.

gress from abridging 'the right of the people to assemble and to petition the government for a redress of grievances.' This, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the national government alone.<sup>1</sup> It is now too late to question the correctness of this construction. As was said by the late Chief-Justice in *Twitchell v. The Commonwealth*,<sup>2</sup> 'the scope and application of these amendments are no longer subjects of discussion here.' They left the authority of the States just where they found it, and added nothing to the already existing powers of the United States."

We have seen that the power of Congress to legislate is confined to such laws as are within the scope of the clause which they are intended to enforce.<sup>3</sup> This limitation is implied in the words "necessary and proper," and results from the tenor of the instrument as a whole.<sup>4</sup> Without it the Tenth Amendment, that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," would be futile, and Congress not less absolute than Parliament.<sup>5</sup> It follows that while every clause in the Constitution may be carried into effect by appropriate laws, their validity will depend on the extent and nature of the clause, and a restraint on State legislation will not enlarge the authority of the United States, or empower Congress to enforce the right which they or the States are forbidden to assail. The effect is to disable them, and not to enable the General Government, except so far as may be requisite to counteract any State law which violates the prohibition.<sup>6</sup>

<sup>1</sup> *Barron v. The Mayor*, 7 Peters, 250.

<sup>2</sup> 7 Wallace, 325.

<sup>3</sup> See *United States v. Reese*, 92 U. S. 214; *United States v. Harris*, 106 Id. 629; *Civil Rights Cases*, 109 Id. 3.

<sup>4</sup> *Ante*, p. 102.

<sup>5</sup> See *Civil Rights Cases*, 109 U. S. 3, 15.

<sup>6</sup> "It is absurd," said Bradley, J., "to affirm that because the rights of life, liberty, and property (which include all civil rights that men have) are by the amendment sought to be protected against invasion on the

The clause which forbids the States to impair the obligation of contracts does not, for instance, give the United States jurisdiction over contracts, or authorize Congress to legislate for the purpose of compelling a man by whom a contractual right is denied or violated to do as he agreed. No such legislation has ever been attempted, and no such attempt could be sustained.<sup>1</sup> Such also is the operation of the Fourteenth Amendment: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law; nor shall any State deny to any person the equal protection of the laws." The final clause, "Congress shall have power to enforce by appropriate legislation the provisions of this article," is necessarily limited in its operation by the foregoing clauses; and what Congress are thus authorized to enforce is not the rights which the article was intended to protect, but the prohibition of any law or action on the part of a State government by which those rights will be impaired.<sup>2</sup> The guaranty is against the laws or acts of the States, and not against the misdeeds of individuals; and the laws made by Congress, under the authority which it

part of the State without due process of law, Congress may therefore provide due process of law for their vindication in every case, and that because the denial by a State to any persons of the equal protection of the laws is prohibited by the amendment, therefore Congress may establish laws for their equal protection. In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation; that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking. . . ." *Civil Rights Cases*, 109 U. S. 3, 11; *United States v. Harris*, 106 Id. 629; *United States v. Reese*, 92 Id. 214; *United States v. Cruikshank*, Id. 542.

<sup>1</sup> *Civil Rights Cases*, 109 U. S. 3, 12.

<sup>2</sup> *United States v. Cruikshank*, 92 U. S. 542; *Virginia v. Rives*, 100 Id. 313; *United States v. Harris*, 106 Id. 629, 639; *Civil Rights Cases*, 109 Id. 3, 11.

confers, are not obligatory on individuals, unless they are acting on behalf of the State.<sup>1</sup>

But for this rule every restraint laid on the States would enlarge the powers of the General Government in a corresponding ratio, and Congress might supersede the State legislatures by providing for the protection of "life, liberty, and property," and to afford redress for the breach of contracts, — things which the Constitution jealously reserves to the States.<sup>2</sup> The United States therefore can no more provide that, under the Fourteenth Amendment, all persons shall be admitted, irrespective of race or color, to public places and conveyances, than they can make a like rule with regard to persons of different sexes, or enact that female students shall be admitted promiscuously to every lecture-room where the anatomy of the human body is taught to men. Such questions fall under the police power, which belongs exclusively to the States, except in the rare instances where it is conferred affirmatively on Congress.<sup>3</sup>

Every constitutional prohibition nevertheless carries with it the power to prescribe the penalty for disobedience, — which

<sup>1</sup> *United States v. Cruikshank*, 92 U. S. 542.

<sup>2</sup> *Civil Rights Cases*, 109 U. S. 3, 13; *Gibbons v. Ogden*, 9 Wheaton, 203; *The License Tax*, 5 Wallace, 471; *United States v. De Witt*, 9 Id. 41; *The Slaughter-house Cases*, 16 Id. 42; *ante*, p. 508.

<sup>3</sup> "The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the States, and it remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, and no more. The power of the national government is limited to this guaranty." *United States v. Harris*, 106 U. S. 639.

"The language of the Amendment," said Waite, C.-J., in *The United States v. Cruikshank*, 92 U. S. 542, "does not leave this subject in doubt. When the State has been guilty of no violation of its provisions, and when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States, when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws of the State which, as enacted by the legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress."

must, however, be limited to the persons on whom the prohibition is laid. If it is general,—that a thing shall not be done or permitted to exist,—every one who violates the rule may be visited with punishment. If, on the other hand, it is addressed to certain classes or officers, no one who does not come within the terms of the law can be treated as in default. The Fourteenth Amendment falls under the former head, because it only applies to the States; but the Thirteenth declares that “neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.” It is therefore broad enough to enable Congress to guard against every restraint on the inherent right of all men to dispose freely of the labor of their hands, whether it is imposed by States, by individuals, or by associations; and would be so though it did not contain the penal clause, “Congress shall have power to enforce this article by appropriate legislation.”<sup>1</sup>

These questions arose in the Civil Rights Cases, under an act of Congress providing that “all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement, subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.” Such was the first section; and by the second every person who violated the foregoing provisions was to “forfeit and pay to the party aggrieved the sum of \$500, to be recovered in an action of debt,” and also “to be deemed guilty of a misdemeanor, and upon conviction thereof fined not less than \$500, or more than \$1,000.” The plaintiffs in error were convicted under these provisions; and when the case came under a writ of error before the Supreme Court, it was contended by the Solicitor-General, on behalf of the United States, that if the refusal to

<sup>1</sup> See *United States v. Harris*, 106 U. S. 629, 644; *Civil Rights Cases*, 109 Id. 3, 20.

admit colored persons into public conveyances and places of amusement on equal terms was not slavery, it was a badge of servitude, and therefore a violation of the Thirteenth Amendment, and moreover abridged the privileges and immunities of citizens of the United States, and operated as a denial of the equal protection of the laws which the Fourteenth Amendment guaranteed. In both aspects it was a violation of prohibitions which were binding alike on the States and individuals, and might be treated by Congress as a crime.

Both contentions were overruled on grounds which were substantially as follows. The Civil Rights bill went beyond the scope of the Fourteenth Amendment, which was intended to guard against injurious legislation by the States, and not to afford redress for the wrongful acts of individuals. A man who makes an assault upon another, or who excludes him from a railway train or public building which he is entitled to frequent, does not deprive him of his right in the sense of the constitutional prohibition, because the right remains, and may be vindicated in a criminal proceeding, or compensation obtained through a suit for damages.<sup>1</sup>

<sup>1</sup> "Civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong or a crime of that individual, — an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation, but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror. He may, by force of fraud, interfere with the enjoyment of the right in a particular case, he may commit an assault against the person, or commit murder, or use ruffianly violence at the polls, or slander the good name of a fellow-citizen; but unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right, he will only render himself amenable to satisfaction or punishment, and amenable therefor to the laws of the State where the wrongful acts are committed. Hence in all

This conclusion is not at variance with the cases which upheld the fourth section of the same act as constitutional. What that declares is that "no citizen who is otherwise duly qualified, shall be disqualified for service of a grand or petit juror on account of race, color, or previous condition of servitude;" and that "any officer charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and fined not more than \$5,000." Giving the term "law" a liberal interpretation, it includes acts done by the officers of a State under color of her laws; and when the jury-box is closed by such an officer against any one by reason of his race or color, it may well be said that he and all persons like him are denied the equal protection of the laws. There is, consequently, a plain breach of the rule laid down by the amendment, and Congress may prescribe the penalty.<sup>1</sup>

For like reasons the restraints laid by the Constitution on the United States do not confer the rights which Congress are forbidden to impair, nor do they empower Congress to provide for the protection of such rights, or to inflict punishment on any one by whom they are assailed. The right of the people to assemble peaceably for any lawful purpose existed before the Constitution was adopted, and would continue though the First Amendment, by which it is guarded from encroachment by the United States, were repealed. The power to enforce the right consequently does not reside in Congress, and

those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offences, but abrogation and denial of rights which it denounces, and for which it clothes Congress with power to provide a remedy. This abrogation and denial of rights, for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong; it must assume that, in the cases provided for, the evil or wrong actually committed rests upon some State law or State authority for its excuse and perpetration." . . . Civil Rights Cases, 109 U. S. 3, 17.

<sup>1</sup> *Ex parte Virginia*, 100 U. S. 339; Civil Rights Cases, 109 Id. 3, 15.

remains in the States. If there is a specific right to petition the government of the United States for a redress of grievances, which Congress may enforce by appropriate legislation, it is not because they are forbidden to abridge the right, but because it results from the Constitution as a whole, and the relation which a representative assembly bears to its constituents. In like manner, if freedom of speech and of the press can be vindicated by Congress, it is only so far as they concern the relations of the people to the United States; and the remark applies to the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizure, to keep and bear arms, to a trial by jury, and not to be deprived of life, liberty, or property without due process of law, and, speaking generally, to all the rights secured by the first eight amendments, except where the authority of the United States has been enlarged by the prohibition of slavery and involuntary servitude in the Thirteenth Amendment.

These principles apply to criminal legislation as well as civil. No matter how injurious an act may be to the United States or prejudicial to society, it will not be punishable by Congress unless it is within the scope of the enumerated powers, or impairs some right which is not merely recognized by the Constitution and guaranteed against the States or the General Government, but guarded from aggression on the part of individuals, or unless the act is done by a public officer on behalf of a State and contravenes some prohibition addressed to her.<sup>1</sup>

In like manner, a prohibition to the States or the United States of acts affecting individuals will not vary their relations as between themselves, or give any man a greater right or remedy against his neighbor than he would have independently of the prohibition.<sup>2</sup> Hence a conspiracy to prevent the courts or officers of a State from affording the equal

<sup>1</sup> See *United States v. Cruikshank*, 92 U. S. 551, 555; *Ex parte Virginia*, 100 Id. 339; *United States v. Harris*, 106 Id. 629; *Civil Rights Cases*, 109 Id. 317; *The Slaughter-house Cases*, 16 Wallace, 36.

<sup>2</sup> *United States v. Cruikshank*, 92 U. S. 551; *Permoli v. First Municipality*, 3 Howard, 589.

protection of the laws, or the privileges or immunities of citizens of the United States, to persons of a particular race or skin, is not a breach of the guaranties of the Fourteenth Amendment which can be chastised or guarded against by the United States; and an indictment under a law passed by Congress for the prevention and punishment of such offences is unconstitutional, whether the conspirators are white men or negroes, and regardless of the race or color of the persons whom they design to injure.<sup>1</sup>

<sup>1</sup> *United States v. Cruikshank*, 92 U. S. 551; see *United States v. Harris*, 106 U. S. 638. "The Fourteenth Amendment," said Waite, C.-J., in the case first cited, "prohibits a State from depriving any person of life, liberty, or property without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. As was said by Mr. Justice Johnson in *The Bank of Columbia v. Okely*, 4 Wheaton, 244, it secures 'the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice.'

"The fourth and twelfth counts charge the intent to have been to prevent and hinder the citizens named, who were of African descent and persons of color, in 'the free exercise and enjoyment of their several right and privilege to the full and equal benefit of all laws and proceedings, then and there, before that time, enacted or ordained by the said State of Louisiana and by the United States, and then and there, at that time, being in force in the said State and District of Louisiana aforesaid, for the security of their respective persons and property, then and there, at that time enjoyed at and within said State and District of Louisiana by white persons, being citizens of said State of Louisiana and the United States, for the protection of the persons and property of said white citizens.' There is no allegation that this was done because of the race or color of the persons conspired against. When stripped of its verbiage, the case presented amounts to nothing more than that the defendants conspired to prevent certain citizens of the United States, being within the State of Louisiana, from enjoying the equal protection of the laws of the State and of the United States.

"The Fourteenth Amendment also prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government

In these instances the restraint was laid, not on the community, but on the States or the General Government; and where an act or thing is absolutely forbidden, the prohibition is universal, and Congress may legislate for the purpose of carrying it into effect. The Thirteenth Amendment falls in the latter category, and may be enforced by declaring slavery a crime, and punishing every man who holds his fellows in bondage. The laws passed for this purpose must nevertheless be confined to such acts as are within the scope of the amendment; and if they go further, by attempting to do away with restrictions which, though unjustifiable, do not amount to servitude, will be merely void.<sup>1</sup> Excluding a man capriciously, or on insufficient grounds, from a theatre, or denying him admission to certain compartments of a railway train, does not make him a slave, nor is it servitude in any sense that can be properly attached to the term.<sup>2</sup>

is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States, and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty." *The United States v. Cruikshank*, 92 U. S. 542.

<sup>1</sup> *United States v. Cruikshank*, 92 U. S. 542; *United States v. Harris*, 106 U. S. 629, 638.

<sup>2</sup> "The provisions and scope of the Thirteenth and Fourteenth Amendments are different: the former simply abolished slavery; the latter prohibited the States from abridging the privileges or immunities of citizens of the United States, from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different. What Congress has power to do under one, it may not have power to do under the other. Under the Thirteenth Amendment it has only to do with slavery and its incidents; under the Fourteenth Amendment it has power to counteract and render nugatory all State laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty, or property without due process of law, or to deny to any of them the equal protection of the laws. Under the Thirteenth Amendment the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals,

What constitutes serfdom, as distinguished from slavery, is not easy to define; but a class may doubtless be reduced to servitude, though no person belonging to it is compelled to work without wages or against his will. Such a result might follow from the restrictions which conquering races have in all ages been apt to impose on the conquered; as, for instance, by subjecting them to summary trial and punishment for acts that would be innocent or venial if done by other men, forbidding them to be abroad after nightfall, to change their place of abode, or to proceed freely along the high-roads without a pass. Such were among the provisions of the so-called Black Code before emancipation, and that would, if enforced to-day, either by the customary or statutory law, contravene the spirit and letter of the Constitutional provision.<sup>1</sup> So the restraints imposed by the associations which, in the name of the rights of labor, preclude the workman from choosing his employer or using his hands as a means of gaining his daily bread, except as they dictate, come so near the involuntary servitude forbidden by the Thirteenth Amendment that they might be abolished were Congress disposed to risk popularity for the love of freedom.

I may add that if the Act of April 20, 1871, is constitutional, the failure of a State to suppress associations formed to deprive classes or individuals by violent means of the rights guaranteed by the Constitution, may render the wrong so far her own that Congress may afford redress by appropriate legislation, or treat such a persistent interruption of the course of law as insurrection, and suspend the *habeas corpus* in the disturbed districts. Should the immigration induced by the artificial rate of wages consequent on the tariff continue unchecked, the dangers which threaten civilization in Europe may, before many years have passed, appear in an

whether sanctioned by State legislation or not; under the Fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against State regulations or proceedings.” Civil Rights Cases, 109 U. S. 3, 23.

<sup>1</sup> See Civil Rights Cases, 109 U. S. 3, 22, 36; The Slaughter-house Cases, 16 Wallace, 42, 57.

aggravated form in the United States, and Congress find themselves compelled to take the act of 1863 as a precedent, and pass stringent laws for the suppression of the secret and anarchical societies which the individual States are unable to control.<sup>1</sup>

<sup>1</sup> The greed of capital tends to hasten the period when constitutional restraints will be unavailing, and the right of property may have to be maintained with the sword. So long as the emigrants to the United States were Norse, Germans, or Celts, or came from Great Britain, they were substantially of the stuff which went to make up the Englishman, and might in the second or third generation be absorbed into the bulk of the American people without prejudice. They were, moreover, above the average in energy and intelligence, and paid their way to America with the fruits of a thrift and industry which found an ample field in the country of their adoption. Now men of every race and the coarsest fibre are imported from every quarter of the globe, who work at half price, lower the tone of American life and manners, and in a country of universal suffrage soon become the dupes and tools of demagogues.

## LECTURE XXV.

*Ex post facto* Laws and Bills of Attainder. — Their Enactment within the Power of Parliament, but inconsistent with the Principle of Magna Charta as applied to all the Branches of Government in the United States. — *Ex post facto* Legislation before the Constitution. — Extent and Meaning of the Constitutional Prohibition. — Difference between *Ex post facto* Laws and Bills of Attainder. — Laws inflicting on a Class Disfranchisement or Professional Disqualification. — The Legislature may regulate the Evidence or the Procedure, provided they do not impair the Rights of the Accused. — The Penalty may be diminished, but must not be aggravated. — What constitutes an Aggravation. — May extend the Period of Limitation while it is still running, but cannot deny the Accused its Protection after it has expired. — Effect of giving the Defendant a Choice between the Original and the Substituted Penalties.

THE subordination of the General and State Governments to organic laws enacted by the people in their sovereign capacity, permits the application of restraints which can have no place in countries where the government is absolute and wields the entire power of the State. Had the doctrine of Magna Charta — that every man shall be tried by his peers — been adhered to, it would have precluded the dangerous practice of inflicting punishment legislatively by bills of attainder, which, used alternately as instruments of kingly power and weapons for the defence of liberty, were always arbitrary, and not infrequently unjust. Though fallen into disuse, they still form an integral part of the English Constitution, and may be applied at any time by Parliament, which may not only find the accused guilty of acts that have previously been defined as crimes, but proceed, *ex post facto*, to create the offence, convict the offender, and prescribe a new and unheard-of punishment which he had no reason to anticipate when the act was done. And it may also, without

going to this length, declare a past act criminal and leave the infliction of the penalty to the judiciary.

Such legislation was not unknown in this country during the revolutionary struggle, and for some years after its termination; and in *Cooper v. Telfair*<sup>1</sup> the Supreme Court of the United States sustained an act passed by the Georgia legislature in 1782, declaring that certain persons were guilty of treason, banishing them from the State, and confiscating their lands and chattels, although the Constitution of Georgia provided that the legislative, executive, and judicial departments should be distinct and separate, so that neither should exercise the powers properly belonging to the other. The court held that wherever the legislative power is undefined, it includes the executive and judicial attributes. There was no such definition in the case before them, and the general principles laid down in the Georgia Constitution must be regarded as declaratory, and not as intended to impose an absolute restriction. The question arose before the Constitution of the United States was adopted, and did not depend on its provisions. It was not altogether clear that the court could set aside a statute as unconstitutional; but if it could, the circumstances did not warrant its interposition.

Such was not the language of Chatham's magnificent protest against the arbitrary proceedings of the House of Commons in the case of Wilkes, but that "*legem facere* and *legem dicere* are powers clearly distinguished from each other in the nature of things," and which the wisdom of the English Constitution sedulously kept asunder.<sup>2</sup> The rule is now established on this basis in the United States.<sup>3</sup>

The consequences of ascribing such omnipotence to the legislature were forcibly portrayed by Edmund Randolph in addressing the Virginia Convention in 1788, and urged as a conclusive reason for adopting a frame of government that

<sup>1</sup> 4 Dallas, 14.

<sup>2</sup> Thackeray's *Life of Chatham*, ii. 1391.

<sup>3</sup> *Greenough v. Greenough*, 11 Pa. 489; *Reiser v. The Saving Fund*, 39 Id. 137, 145; *Haly v. Philadelphia*, 68 Id. 45; *Kelsey v. Kendall*, 48 Vt. 24; *Black, Constitutional Prohibitions*, sect. 194.

would operate as a salutary restraint on the excesses of the several States. The Constitution had been violated "from the year 1776 down to the present time, — violations effected through acts passed by the legislature; everything had been drawn into the legislative vortex." The obligations of contracts, the security of titles, the rules which guarded life and liberty, — all had been sported with by acts passed under the spur of a real or supposed necessity.

There was an instance which he could not recall without horror. It was that of a man, one Josiah Philips, who had been charged in the House of Delegates with having committed various crimes, and who was alleged to be at large and meditating others. On this accusation, unsustained by evidence, a bill of attainder was brought in, read three times in one day, and sent to the Senate, which adopted it soon afterwards, and Philips was thus sentenced and executed without being confronted with his accusers or an opportunity to call witnesses for his defence. There were still a multitude of complaints of the debility of the laws. Justice was in many instances so unattainable that commerce might be said to have entirely ceased. There was no peace in the land. Peace could not co-exist with injustice, licentiousness, insecurity, and oppression.<sup>1</sup>

Instances of a like kind may be found in the annals of the other States, and Randolph might well insist that the excessive licentiousness which had resulted from the relaxation of the existing system was a cogent reason for the adoption of a Constitution which would secure the citizen in person and estate, and invigorate and restore commerce and industry.<sup>2</sup>

It is well when the past justifies our preference for existing institutions. But for the restraints imposed by the Constitution of the United States, a convention acting in the name and with the sovereign authority of the people might abrogate the organic law of a State, and confiscate the property of an obnoxious individual, or attain him, and carry the sentence into execution on the nearest tree or lamp-post.

<sup>1</sup> 3 Elliott's Debates (2d ed., Phila., 1876), 66.

<sup>2</sup> 1 Bl. Com. 46. See *Green v. Shumway*, 39 N. Y. 418.

The powers which Parliament may exercise, and which the Constitution of the United States forbids, were described as follows by Mr. Justice Chase in the case of *Calder v. Bull*:<sup>1</sup> "The prohibition against *ex post facto* laws was introduced for greater caution, and very probably arose from the knowledge that the Parliament of Great Britain claimed and exercised a power to pass such laws, under the denomination of bills of attainder or bills of pains and penalties, the first inflicting capital, and the other a less, punishment. The acts were legislative judgments and an exercise of judicial power. Sometimes they created the crime, by declaring acts to be treason which were not treason when committed. At other times they violated the rules of evidence (to supply a deficiency of legal proof), by admitting one witness when the existing law required two, by receiving evidence without oath, or the oath of the wife against the husband, or other testimony which the courts of justice would not admit. At other times they inflicted punishments where the party was not by law liable to any punishment, and in other cases they inflicted greater punishment than the law annexed to the offence. The ground for the exercise of such legislative power was this: that the safety of the kingdom depended on the death or other punishment of the offender, — as if traitors, when discovered, could be so formidable, or the government so insecure."

The framers of the Constitution were careful to provide against so great an evil. Section 9 of Article I. accordingly declares that no bill of attainder or *ex post facto* law shall be passed by Congress, and section 10 extends the prohibition to the States. These clauses have received a restrictive interpretation which narrows their literal signification. Literally, every law passed after the event to which it relates and operating by retroaction is *ex post facto*. Technically, and as used in the Constitution of the United States, the phrase comprehends only penal legislation rendering an antecedent act punishable in a manner in which it was not punishable

<sup>1</sup> 3 Dallas, 386.

when committed.<sup>1</sup> A law divesting a prior vested right — as by abrogating the lien of a judgment, or taking the property of A and conferring it on B — is not, it has been said, within the prohibition.<sup>2</sup>

The point actually determined in *Calder v. Bull* was, that a law of Connecticut providing for the re-hearing of a cause which had been already adjudicated, and resulting in a reversal of the prior judgment, did not contravene the constitutional prohibition; but the judges were explicit that a law retrospectively impairing rights that would otherwise have been valid is not *ex post facto* unless the object is to inflict punishment; and this view is sustained by the general current of decision.<sup>3</sup>

If the definition given in *Calder v. Bull* is to be taken literally, and strictly followed, the legislature may evade the prohibition by disguising the intention to punish, and clothing a penal statute in the garb of civil legislation. A law confiscating the property of a citizen is not less clearly punitive because it assumes the form of a declaration that his title is invalid, or that a third person has a better right. It is not the form or pretext, but the effect which should be considered, in determining whether a law is consistent with the provisions by which property is guarded and liberty secured.

The nature of a bill of attainder has already been described. The distinction between such a measure and *ex post facto* legislation is that in the latter the legislature lays down the rule and leaves the application of it to the tribunals, while in the former it assumes the judicial function, and not only enacts, but administers the law.

A bill of attainder may nevertheless be *ex post facto*, and is so when it punishes a lawful act or inflicts a different penalty

<sup>1</sup> *Calder v. Bull*, 3 Dallas, 386; *Fletcher v. Peck*, 6 Cranch, 87; *Grim v. The Weissenberg School District*, 57 Pa. 435; *Commonwealth v. Bailey*, 81 Ky. 395.

<sup>2</sup> *Watson v. The New York Central R. R.*, 47 N. Y. 157; *Harvey v. Thomas*, 10 Watts, 65, 67.

<sup>3</sup> *Watson v. Mercer*, 8 Peters, 88; *Carpenter v. Pennsylvania*, 17 Howard, 456.

from that which would have been incurred under the law as it stood when the act was done. When the penalty falls short of death and the corruption of blood, the bill is usually described in England as one of pains and penalties; and it was under a proceeding of this nature that the trial of Queen Caroline, in 1821, gave occasion for the fervid eloquence of Brougham. But such laws are, equally with bills of attainder, technically so called, within the constitutional prohibition, which was meant to preclude a legislative invasion of the judicial province. Any attempt to inflict punishment legislatively, either individually or by describing the offenders generally, will therefore sin against the letter and spirit of the Constitution.

For many years the people of the United States enjoyed a season of tranquillity which gave no opportunity or excuse for the exercise of the powers which governments are apt to arrogate at critical periods; and it was not until the year 1866 that it became necessary to determine how far Congress or the legislature of a State may go in impairing the rights of the citizen. The question arose in two cases of great importance.<sup>1</sup> In *Cummings v. The State of Missouri* the plaintiff in error had been convicted by the courts of Missouri and sentenced to a fine and imprisonment for the offence of giving secular and spiritual instruction as a priest and minister of the Catholic Church without having first taken the oath which the Constitution of the State required. The third section of that instrument, as then recently adopted, enumerated various antecedent acts which were to exclude every one who had committed them from the right of suffrage, and declared that no such person should be capable of holding any office of honor or profit, or of being an officer, councilman, trustee, or other manager of any corporation, public or private, or of acting as a professor or teacher in any educational institution, or in any public or common school, or of holding any real estate or other property in trust for any religious society or congregation. Among the acts thus specified as criminal were having given aid, comfort, coun-

<sup>1</sup> *Cummings v. Missouri*, 4 Wallace, 277; *Ex parte Garland*, Id. 333.

tenance, or support to persons in armed hostility to the United States or to the lawful authorities thereof, by unlawfully sending within their lines money, goods, or information; having disloyally held communication with such enemies, or having by act or word manifested an adherence to their cause or a desire for their triumph over the United States, or sympathy with those engaged in inciting or carrying on rebellion against the United States; and finally having come into or left the State for the purpose of avoiding enrollment in the service of the United States. The sixth section of the Constitution required every man who sought to fill any such place or office to swear that he had never directly or indirectly done any of the acts in the third section specified, and that he had always been truly loyal on the side of the United States against all enemies thereof. By the ninth section, no person should be permitted to practise as an attorney or counsellor at law, or be competent as a bishop, priest, deacon, minister, or other clergyman of any religious sect or denomination, to teach, preach, or solemnize marriages without first taking, subscribing, and filing said oath; and by the fourteenth section, whoever held or exercised any of the offices, professions, or functions above specified, without having been so sworn, was on conviction thereof to be punished by a fine of not less than five hundred dollars, or by imprisonment in the county jail for not less than six months, or by both fine and imprisonment; and should, on the other hand, if he took the oath and swore falsely, be adjudged guilty of perjury, and be imprisoned in the penitentiary for not less than two years.

The question in *Ex parte Garland* was substantially the same with that considered in *Cummings v. The State of Missouri*, except that it arose under an act of Congress passed on the 24th of January, 1865, by which it was provided that no person should thereafter be admitted to the bar of the Supreme Court of the United States, or of any circuit or district court of the United States, or be allowed to appear or be heard in any such court, without taking an oath that he had never voluntarily given aid, counsel, or encouragement

to persons engaged in hostility to the United States, or sought or attempted to exercise the functions of any office under an authority, or pretended authority, in hostility to the United States. The petitioner Garland had been admitted to the bar of the Supreme Court in December term, 1860. He then took part in the Rebellion, and was a member of the Congress of the Confederate States from May, 1861, until that body was finally dissolved. Having subsequently been pardoned by the President, he applied for permission to practise as an attorney of the court without taking the oath prescribed by Congress.

In deciding these cases it became necessary to determine, — first, whether a law inflicting punishment legislatively on a class of persons, without designating them individually, violates the provision against bills of attainder; and next, whether such a law is *ex post facto* within the meaning of the Constitution, where the penalty consists in the exclusion of the party from the right of suffrage or the pursuit of a calling or avocation, without inflicting fine or imprisonment, unless he renders himself liable by disregarding the prohibition.

The opinion of the majority of the court, delivered by Mr. Justice Field, was as follows: —

It could not be denied that the States might, by virtue of their sovereign attributes, determine the qualifications for office and the conditions on which their citizens might exercise their various pursuits and callings; but in doing so they must act in subordination to the restraints imposed by the Constitution of the United States, by which they were forbidden to pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts. A bill of attainder was a legislative act inflicting capital punishment without a judicial trial; and to effect the object of the Constitution the term must be construed as including bills of pains and penalties. In cases of this description the legislature exercised the powers and office of a judge, pronounced upon the guilt of the accused without any of the forms or safeguards of a trial, determined the sufficiency of the proofs produced with-

out being bound by the ordinary rules of evidence, and prescribed whatever punishment it thought fit for the crime. Such bills were generally directed against individuals by name; but they might be directed against a class. Their essential characteristic was the infliction of punishment directly by the legislature, without giving the accused an opportunity for defence in the ordinary course of law. It did not matter that the penalty was coupled with a condition, if the condition was one which the party could not or was not bound to perform. If the Constitution of Missouri had declared that all clergymen and lawyers within the State were guilty of treason and should be precluded from pursuing their several callings, it would have been a manifest violation of the Constitution of the United States; and the case was substantially the same where all such persons were compelled to choose between disqualification and an oath which many of them could not take consistently with the truth, or without incurring the penalty prescribed for perjurers. The Constitution dealt with substances, and not with shadows, and was intended to protect the rights of the citizen against deprivation for past acts by legislative enactment under any form, however disguised. If the inhibition could be evaded by a change in the form of the enactment, it was inserted in the fundamental law to little purpose.

It was equally clear that the provision of the Constitution of Missouri inflicted punishment *ex post facto*, contrary to the Constitution of the United States. The counsel for the State of Missouri had contended that to punish was to deprive of life, liberty, or property, and that anything which fell short of this could not justly be styled punishment. This proposition was inadmissible if liberty and property were to be understood as including what renders life valuable and property secure. If the means by which a livelihood might be gained, and property acquired, were withdrawn from the citizen as a consequence of what he had done or omitted, he was punished both in the legal and ordinary acceptation of the term. Disqualification from office might be a punishment, as in case of conviction on impeachment,

and so might a prohibition to hold places of trust or profit, or to exercise a calling or profession. If such a penalty could be inflicted retroactively by a law passed after the offence, the guaranty which the Constitution intended to afford, would fail. In *Fletcher v. Peck*,<sup>1</sup> Chief-Justice Marshall had said that the legislature were prohibited from passing a law by which a man's estate or any part of it could be seized for a crime which was not made punishable in that manner by some previous statute. The estate of the plaintiff in error could not have been taken from him by a law which was professedly a bill of attainder or *ex post facto*; it could not, therefore, be taken from him by a law which declared the grant under which he held, invalid. This opinion showed that even where a statute did not in terms define a crime, impose a penalty, or authorize a legal prosecution, it would, notwithstanding, be contrary to the Constitution, if the substantial effect was to inflict punishment for an act done before the passage of the statute. Tried by this standard, the act of Congress and the clauses of the Constitution of Missouri were clearly inoperative and void. They did not declare an act criminal, or inflict punishment in terms; but they assumed that there were certain persons in Missouri who had committed certain acts which they described, and then went on to deprive all such persons of valuable rights and privileges, unless they would comply with an impossible condition, by swearing that they were free from the imputed offence. Some of these acts were not punishable by any law at the time when they occurred, others were not subject to the penalty now prescribed. Punishment so inflicted was retroactive or *ex post facto*, and equally so whether the penalty was applied directly by the legislature, or through the channel of the courts. A law declaring that every one who had by deed or word sympathized with the Rebellion, or who had entered or left the State to avoid the draft, should upon conviction thereof be precluded from voting, holding any private or public office, or exercising the profession of a clergyman or lawyer, would confessedly have been contrary to the Con-

<sup>1</sup> 6 Cranch, 137.

stitution of the United States; and the wrong was heightened where the penalty was inflicted legislatively, without allowing the accused an opportunity to show those mitigating circumstances which not infrequently convince a court and jury that one who has broken the letter of a statute is guiltless of offence against its spirit.

The decision was substantially the same in *Ex parte Garland*. A majority of the court held that a statute depriving a man or class of men of the right to exercise a profession or of any other valuable privilege as a consequence of a real or imputed offence, is a legislative infliction of punishment, and therefore virtually a bill of attainder; that if the offence was not punishable when committed, or not punishable in that manner, the statute is also *ex post facto*; and, finally, that it makes no difference whether the deprivation is absolute or conditional, if the condition is one which cannot be fulfilled consistently with the purport of the statute.

The minority of the court, consisting of the Chief-Justice and Miller, Swayne, and Davis, JJ., arrived at a different conclusion in both instances. They held that the right of a man to exercise his profession as a clergyman or lawyer is a privilege, and not an absolute right. To take it from him, therefore, for sufficient cause, is not a punishment, but the regulation of a public duty which concerns the community at large. Neither the clauses of the Constitution of Missouri nor the act of Congress were a bill of attainder in the proper sense of the word. They did not inflict death, or work a corruption of blood. They did not point out any person, either by name or by description, against whom they were to operate. The oath which they prescribed was required of all persons alike. They convicted no one, either individually or by description, as belonging to a class. If any one suffered by their operation, it was because he refused to take the oath; and then it was his own act, and not the statute, which wrought his condemnation. Such a statute, designating no criminal, declaring no guilt, pronouncing no sentence, could not be called a bill of attainder.

In considering whether the statute was an *ex post facto*

law, the only question could be whether it came within the well-settled definition by which that term was restricted to punishment imposed retroactively for a past offence. Laws that were really *ex post facto* in their nature would be found on examination, first, to contemplate the trial of some person charged with an offence, and next the punishment of the person found guilty of such an offence. The law in question was not criminal in its operation, and did not presuppose a trial of any kind ; all that it required was that every one who proposed to enter upon certain important duties should take an oath that he had been loyal to the government under which he lived. If he refused, the matter ended ; there was no prosecution, and no punishment prescribed.

The fatal error in the reasoning of the majority of the court was the meaning which they attached to the word "punishment" in relation to the question which the court had to decide. Punishment was, according to the definition given by Mr. Edward Worden, the penalty for transgressing the laws. There was no law whose transgression was punished by the act of Congress, none was referred to in the act, and there was nothing on its face to show that the deprivation it prescribed was intended as a punishment for any offence described in any other act. The whole purpose of the act of Congress was to require loyalty as a qualification for those who practised law and preached the Gospel. If the effect was to exclude those who were disloyal, it was no more a punishment than a provision that no one who was not a native-born citizen should be President, or that a man must be a white male citizen in order to exercise the right of suffrage, was a punishment of aliens or of negroes.

The argument which had been made in the case of *Cummings v. The State of Missouri*, that the Constitution of the United States guaranteed the freedom of religious worship against interference by the States, was not sanctioned by the Constitution. In the case of the Rev. B. Permolli,<sup>1</sup> a Catholic priest who had been fined for performing the funeral services of his church over the body of one of his parishioners in the

<sup>1</sup> 3 Howard, 589.

Roman Catholic Church of St. Augustine, contrary to an ordinance of the city of New Orleans, which required that all funeral rites should take place in a public chapel, appealed from the sentence to the Supreme Court of the United States. The decision was, that the Constitution contained no clause guaranteeing religious liberty against the several States, which might make such regulations on the subject as they thought fit. The State of Missouri might therefore well provide that no priest of any church should exercise his ministerial functions without showing by his own oath that he had been true to the State and the Union.

With regard to one of the questions involved in these cases, we may believe that the court could not justly have reached any other conclusion; and the judgment would seem to have been equally sound as it respects the other. The definition of a bill of attainder would seem to be a law inflicting punishment directly, without the intervention of the courts. The act of Congress, like the Constitution of the State of Missouri, was in effect a declaration that every one who did not swear that he had not done certain things should be excluded not only from all places of public trust, but from various honorable and lucrative employments in private life. This was obviously as much a punishment as if the penalty had been death. Such a privation would discredit the sufferer, and might result in death; because he who takes away the means by which I live, aims at my life. It does not follow that there are any others open to me by which I can subsist. The idea thrown out by Mr. Justice Miller in *Ex parte Garland*, that a deprivation which falls short of fine, imprisonment, or confiscation, is not penal, is contrary to the rule that remedial statutes shall be construed liberally, with a view to effect their purpose, which in this instance is that the legislature shall not make laws which will operate as penal sentences or decrees.<sup>1</sup>

The language of Chief-Justice Marshall in *Fletcher v. Peck* shows that an act confiscating the property of a citizen is as much a bill of attainder as if he were pronounced a

<sup>1</sup> See *Fletcher v. Peck*, 6 Cranch, 138.

criminal and fined or imprisoned.<sup>1</sup> If this be conceded, the question is virtually at an end, because it is not only unjust, but contrary to the first principles of our government, to draw a line between the right which a man has in his property, and in his skill and labor. A State which has and can exercise such a power, may reduce the citizen to slavery. If he can be excluded from one employment he may be excluded from every other; and a man who is shut out from the profession in which he has been educated, and which is the only one that he understands, is virtually excluded from all, and may be unable to gain a living. The minority of the court may have been right in saying that it is not a punishment to withhold the right of voting because of race or color; but the argument would not hold if negroes were forbidden to be officers, directors, or trustees of any corporation, public or private, to be teachers or professors in any school or college, to practise law or preach the gospel, and if all these consequences were drawn, not from the irreversible act of nature, but from acts done by themselves, and imputed as crimes.

Another argument, urged by the minority of the court, was, that the prohibition of bills of attainder was not violated, because the Constitution of Missouri did not sentence

<sup>1</sup> "The State legislature can pass no *ex post facto* law. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed.

"Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annulling the title by which he holds that estate? The court can perceive no sufficient grounds for making this distinction.

"This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an *ex post facto* law, or bill of attainder. Why, then, is it allowable in the form of a law annulling the original grant?" *Fletcher v. Peck*, 6 Cranch, 138.

the criminal, but left him free to declare that he had not committed the offence. When, however, it is enacted that a man shall be deprived of his occupation or estate if he does not purge himself by oath, and that if he does, and swears falsely, he shall be deemed guilty of perjury and imprisoned on conviction, a sentence is imposed that can scarcely be deemed light. The penalty consists in the obligation to make such a choice. The legislation of antiquity presents numerous instances where punishment was inflicted by presenting an alternative to the accused, and compelling him to elect on which branch he would be suspended. The choice presented by the State of Missouri to that large class of the population who, having sympathized with the rebellion, or endeavored to avoid conscription by a change of domicile, could not take the oath prescribed, was therefore a punishment, notwithstanding the avenue seemingly left open for escape. And there can be little doubt that it possessed the other essential characteristic of a bill of attainder. Legislation, in the proper sense of the term, prescribes a rule which the courts are to apply. Every man who commits burglary shall be imprisoned as a felon: this is the rule of law. B has committed burglary within the rule, is the judgment of the court. A law will not be a bill of attainder because it retroactively creates the crime, unless it applies the punishment without the intervention of the tribunals; but if this is done the law will be judicial, and contrary to the true meaning of the Constitution. A statutory declaration that every man who had actually or by construction taken part with the Confederacy should be deprived of his goods and land, might be *ex post facto*, but it would not be a bill of attainder, because it would still remain with the courts to determine who was within the law. But a declaration that the estate of every man who declined to swear that he had not participated in the rebellion should be forfeited to the United States, would obviously be within the constitutional prohibition; and so would an act appointing commissioners to administer such an oath, and directing that every one who refused to comply, should be led to execution. For as the intention of the Con-

stitution in forbidding bills of attainder was that the legislature might declare, but should not apply the rule, a statute imposing a penal disability is contrary to the spirit of the prohibition, whether it includes a multitude of persons, or is aimed at an individual.<sup>1</sup> This seems to be conceded when the persons whose rights are impaired or abrogated are named in the statute, and is equally true when they are designated or described, and the question left open for the courts is not as to the guilt of the accused, but whether he belongs to the class indicated by the legislature. A bill which designates no one, and is merely *in rem*, may yet operate as a bill of pains and penalties; as, for instance, if it were enacted that all the real or personal property in the State of South Carolina was forfeited to the government for the disloyalty of the inhabitants. Under these circumstances the injury to the owners would obviously be the same as if they were described individually, and they should therefore be shielded by the Constitution.

The tendency of the decisions has been to narrow the operation of the term *ex post facto*, by giving it a technical interpretation which the framers of the Constitution seemingly did not intend or contemplate.<sup>2</sup> Translated literally, "*ex post facto*" is "subsequent to the act," and is broad enough to include all retroactive legislation. It is too late to rectify the error, if such it be; but the courts should at least take care that the Constitution be not evaded by the enactment of penal laws in the guise of remedial statutes.<sup>3</sup> Criminal legislation is not distinguished from civil by any clear or well-defined characteristic, and a sentence by which one is deprived of his land or goods, is not less injurious because no cause is assigned, or because the professed object is not to punish him, but to benefit the community or further some political design.

<sup>1</sup> Fletcher v. Peck, 6 Cranch, 138.

<sup>2</sup> Calder v. Bull, 3 Dallas, 390; Kring v. Missouri, 107 U. S. 221; Greenough v. Greenough, 11 Pa. St. 489, 495; Carson v. Carson, 40 Miss. 349; Satterlee v. Matthewson, 2 Peters, 380, 415.

<sup>3</sup> Fletcher v. Peck, 6 Cranch, 138; Greenough v. Greenough, 11 Pa. St. 495; Reiser v. Tell. Association, 39 Pa. St. 137.

To understand the true import of the clause, it should be read as a whole. "No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." Looking at the breadth and scope of this declaration, and the collocation of the several parts, there can be little doubt that it was meant to preclude all retroactive legislation tending to defeat vested rights, and every law inflicting a deprivation for a real or imputed offence, whether the intention was set forth or evasively concealed. So interpreted, it becomes what it was declared to be in the eighty-fourth number of the *Federalist*, "a comprehensive bill of rights, rendering other and more specific safeguards superfluous."

The right to the enjoyment of life, liberty, and property may be assailed by criminal or by civil legislation, or through a usurpation of the judicial function by the legislature; and the design of the framers of the Constitution seems to have been to close each of these avenues effectually. It may be true that the prohibition of *ex post facto* laws was intended to prevent punishment from being inflicted arbitrarily; but a law may be punitive in effect without being so in terms. It is the operation of the statute, and not the recital in the preamble or enacting clause, that should be regarded in determining whether it is *ex post facto*. A man whose rights and privileges are taken from him, who is despoiled of his lands or goods, exiled or imprisoned, is punished although he be not called a criminal or charged with having committed an offence.<sup>1</sup>

In *Green v. Shumway*<sup>2</sup> a law declaring retroactively that

<sup>1</sup> Would any one contend that the decree which was given in Shushan the palace in the name of King Ahasuerus, and sealed with the king's ring, and "sent by posts into all the king's provinces, to kill, and to cause to perish, all Jews, both young and old . . . and to take the spoil of them for prey," Esther iii. 12, 13, is not *ex post facto* in the sense of the Constitution of the United States because it did not assign a cause or designate individuals, or that its character would have been materially different had it been restricted to persons who would not forswear their descent or creed?

<sup>2</sup> 39 N. Y. 418.

no man should exercise the right of suffrage without taking an oath that he had not concurred in the Rebellion, was held, in accordance with *Cummings v. The State of Missouri*, to be *ex post facto*, and contrary to the Constitution of the State and of the Union. In *Pierce v. Carskadon*,<sup>1</sup> the Supreme Court decided, in accordance with *Ex parte Garland*, that a statute precluding a re-hearing in civil cases unless the applicant would swear that he had not borne arms against the State or Union, was inhibited by the Constitution of the United States. These decisions seem in every respect preferable to that in *The State v. Neal*,<sup>2</sup> where a distinction was taken between the deprivation of the franchise and of the right to exercise a trade or profession. Both are obviously penalties, and neither can be imposed after the event, consistently with the immutable principles of justice embodied in the Constitution of the United States.

We have seen that, according to the definition given by Chief-Justice Marshall, an *ex post facto* law is a law rendering a past act punishable in a manner in which it was not punishable when committed. Strictly taken, this might include a law diminishing the amount of the penalty without changing its nature, as by shortening a term of imprisonment or reducing the amount of a fine. It is, however, well settled, both on principle and authority, that such a change will not render the law unconstitutional, or entitle the accused to insist that the whole punishment shall be inflicted, or none.<sup>3</sup> But it has also been held that the substitution of one punishment for another will be obnoxious to the constitutional prohibition, even if the penalty which the offender has to undergo is, according to common apprehension, less than he would have suffered under the law as it originally stood. Death consequently cannot be replaced by imprisonment, or imprisonment by a fine, as it regards antecedent offences, without freeing the criminal from liability unless he has

<sup>1</sup> 16 Wallace, 234.

<sup>2</sup> 42 Mo. 119.

<sup>3</sup> *State v. Arlin*, 39 N. H. 180; *Mary Hartung v. People*, 22 N. Y. 95; *State v. Kent*, 65 N. C. 311.

been convicted and sentenced according to the pre-existing law, because as that is repealed, the offender cannot be convicted and sentenced as it prescribed, and the new law cannot operate retroactively without contravening the constitutional prohibition. It follows that the accused is not liable under either act, and must be discharged.

For like reasons, the repeal of a penal statute will discharge all persons who are liable under its provisions, although the repealing act prescribes the same or a lesser penalty, because the former law is gone, and that which takes its place cannot operate retroactively, consistently with the constitutional prohibition.<sup>1</sup>

In the *Commonwealth v. Marshall*, the defendant was convicted under a statute against rifling graves, passed in 1814, but which had been repealed in 1830 by another statute which was substantially the same in effect. Shaw, C.-J., said that the act charged in the indictment "cannot be punished as an offence at common law, for that was not in force during the existence of the statute; nor by the statute of 1814, because it has been repealed without any saving clause; nor by the statute of 1830, for the act was done before that statute was passed. No judgment therefore can be rendered against the defendants on this indictment."

The point arose in *Hartung v. The People*,<sup>2</sup> under a statute repealing all former laws providing for the punishment of murder, without excepting offences already committed, and providing that on conviction the criminal should be kept in confinement for one year at hard labor, and not executed before the expiration of that period, nor until a warrant was issued for the purpose by the Governor. In delivering the opinion of the court, Denio, J., said that the legislature might by law remit any separable portion of the punishment affixed by the existing laws to prior offences. They might, for instance, if the punishment were fine and imprisonment, dispense with either, or diminish the length of the one or the

<sup>1</sup> *Commonwealth v. Marshall*, 11 Pick. 350; *Commonwealth v. Kimball*, 21 Id. 373.

<sup>2</sup> 22 N. Y. 95.

amount of the other. So a convict sentenced to hard labor or solitary confinement might have his sentence mitigated by rules providing for the discipline and government of the prison. But here the authority of the legislature ceased, and they could not change the nature of the punishment even for a milder one. By one of the clauses of the Revised Statutes it had been provided that the period between sentence and execution should not be less than four nor more than eight weeks. Under the repealing act the criminal was to be kept in prison for a year with a sword suspended over his head, and then executed whenever the Governor or his successors thought fit. It was not enough to say that most persons would probably prefer such a fate to the former sentence. The court had neither the means nor right to determine that question. It was enough to condemn the law, that it inflicted a different punishment for a past act from that originally prescribed.

In *Shepherd v. The Commonwealth*,<sup>1</sup> the court held, in conformity to the above decision, that an act substituting hard labor for life as the punishment for arson, for the capital sentence previously prescribed, was *ex post facto* and unconstitutional as regarded offences committed before the passage of the act.

In *The Commonwealth v. Wyman*,<sup>2</sup> the Supreme Court of Massachusetts came to a different conclusion on the following grounds: "An *ex post facto* law is one which declares an act previously done criminal and punishable, and which was not so when the act was done, or which declares a much higher punishment than existed at the time. But an act plainly mitigating the punishment of an offence is not *ex post facto*; on the contrary, it is an act of clemency. A law which changes the punishment from death to imprisonment for life, is a law mitigating the punishment, and therefore not *ex post facto*."<sup>3</sup>

<sup>1</sup> 25 N. Y. 406.

<sup>2</sup> 12 Cushing, 239; *Commonwealth v. Gardner*, 11 Gray, 438.

<sup>3</sup> *Commonwealth v. Mott*, 21 Pick. 492; *Calder v. Bull*, 3 Dallas, 386; 1 Kent's Com. (7th ed.), 450; Story on Constitution, sect. 1339.

In *Strong v. The State*,<sup>1</sup> the substitution of imprisonment in the penitentiary for a term not exceeding seven years, for one hundred stripes, which were the penalty under the prior law, was in like manner held not to be *ex post facto*; while the same view was taken in *The State v. Williams*<sup>2</sup> of the commutation of death into fine, whipping, and imprisonment. These decisions go very far, and are irreconcilable with the ground taken in *Hartung v. The People*; but there is no reason for questioning the judgment in *Clarke v. The State*,<sup>3</sup> that where the defendant has the option of determining whether he will undergo the new punishment or the old, there is nothing unconstitutional in the change.

In *The Commonwealth v. McDonough*<sup>4</sup> it was held that a law passed after the commission of the offence of which the defendant stood charged, which mitigated the punishment as regarded the fine and the maximum of imprisonment that might be inflicted, was *ex post facto* as to that case, because the minimum of imprisonment was made three months, whereas before, there was no minimum limit to the court's discretion. This slight alteration was held to be *ex post facto* as to the case in hand, though the effect was to leave no law under which the defendant could be punished, and to set him at large. Such also is the view taken in *Kring v. Missouri*; <sup>5</sup> and the authorities as a whole may be regarded as establishing that a change in the manner of the punishment will be equally *ex post facto* whether the penalty is or is not thereby rendered more severe.<sup>6</sup>

The prohibition of *ex post facto* legislation includes, 1. "Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2. Every law that aggravates a crime, or makes it greater than it was when committed. 3. Every law that changes the punishment, and inflicts a greater pun-

<sup>1</sup> 1 Blackford, 193.

<sup>4</sup> 13 Allen (Mass.), 581.

<sup>2</sup> 5 Wis. 308.

<sup>5</sup> 107 U. S. 230.

<sup>3</sup> 23 Miss. 261.

<sup>6</sup> *Fletcher v. Peck*, 6 Cranch, 137; *Shepherd v. The People*, 25 N. Y. 406, 415.

ishment than the law annexed to the crime when committed. 4. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence in order to convict the offender."<sup>1</sup>

Two different views have been taken of these principles. They agree that no change disadvantageously affecting the accused can be made as to the crime, the evidence, or the punishment, and that a law which contravenes the principle will not be less *ex post facto* because it is passed before the trial.<sup>2</sup> But agreeably to one of them, so long as all essential rights are untouched, the legislature may regulate the procedure or means through which they are enforced, and, in so doing, prescribe any rule which will secure a fair and unbiassed hearing on the merits.<sup>3</sup> They may, consequently, in conferring the right of appeal, provide that if the verdict and judgment are set aside, and the case comes before another jury, it shall be considered by them, as it was in the first instance, on the merits, without regard to the result of the former trial; and if such a provision is omitted, it may be enacted subsequently with regard to past as well as future crimes. Agreeably to the other view, if, when the offence is committed, there be any rule, however technical, which can by possibility avail the accused, he must retain it to the end, and the stumbling-block cannot be legislatively removed from the path of justice.

A man against whom an erroneous sentence is pronounced for an offence of which he stands convicted is technically entitled under the common law to be discharged when it is reversed.<sup>4</sup> His essential right is to have the error corrected

<sup>1</sup> *Calder v. Bull*, 3 Dallas, 390; *Kring v. Missouri*, 107 U. S. 221, 228.

<sup>2</sup> See *Kring v. Missouri*, 107 U. S. 221; *Hart v. State*, 40 Ala. 32; *Southwick v. Southwick*, 49 N. Y. 570.

<sup>3</sup> *Gut v. Minnesota*, 9 Wallace, 35; *Commonwealth v. Phillips*, 11 Pick. 28; *Commonwealth v. Dorsey*, 103 Mass. 412; *State v. Johnson*, 81 Mo. 60; *State v. Wilson*, 48 N. H. 398; *Shepherd v. The People*, 25 N. Y. 406; *Ratzky v. The People*, 29 Id. 124.

<sup>4</sup> *Shepherd v. The People*, 25 N. Y. 406; *Dyer v. The Commonwealth*, 23 Pick. 404.

by rendering the proper judgment. Agreeably to the first of the above views, the legislature may remedy the defect, subsequently to the commission of the offence, by authorizing the court of error to give the judgment which the court below ought to have pronounced.<sup>1</sup> According to the other view, such a statute is *ex post facto* and invalid.<sup>2</sup>

The case of *Ratzky v. The People*<sup>3</sup> inclines to the former view, the case of *Kring v. Missouri*<sup>4</sup> to the latter; and if the decisions are reconcilable, this can hardly be said of the reasons given by the judges. In *Kring v. Missouri* the plaintiff in error Kring killed a man, and was indicted for murder. Soon after the commission of the crime an amendment to the State Constitution virtually provided that on the reversal of the judgment in a criminal proceeding under a writ of error taken by the accused, the case should be on the same footing as if the jury had disagreed and been discharged, and should therefore be considered and determined as though it were on trial for the first time. The case subsequently came before a jury, when Kring entered a plea of guilty of murder in the second degree, which the court accepted, and sentenced him to imprisonment for a term of twenty-five years. He then asked that the sentence should be set aside, and for leave to withdraw the plea and have his original plea of not guilty reinstated, in order that he might have a trial on the merits. The motion was overruled; but the judgment was reversed on appeal, and the cause remanded on the ground that the prisoner had been misled by an assurance from the district attorney that the sentence would not exceed ten years.

When the case was again brought to trial, Kring refused to withdraw his plea of guilty of murder in the second degree or to plead not guilty. The court ordered such a plea to be entered, and the jury gave a verdict of guilty of murder in the first degree, and Kring was condemned to be hanged. This sentence was affirmed by the Missouri Court of Last

<sup>1</sup> *Ratzky v. The People*, 29 N. Y. 124.

<sup>2</sup> *Kring v. Missouri*, 107 U. S. 221, 240, 249.

<sup>3</sup> 29 N. Y. 124.

<sup>4</sup> 107 U. S. 221, 240, 249.

Resort, but reversed by the Supreme Court of the United States, which held that the accused was entitled to the benefit of the law as it existed when the deed was done. By that law, "a plea of guilty of murder in the second degree accepted by the State was an acquittal of murder in the first degree, having the same effect as to future trials as a conviction of murder in the second degree, although the judgment should be reversed on the application of the prisoner." And as the amendment altered this rule to his disadvantage and deprived him of a defence which would otherwise have been valid, it was manifestly *ex post facto*.

Agreeably to the rule as given in Blackstone, "the plea of *autrefois convict*, or a former conviction for the same identical crime, though no judgment was ever given, or, perhaps, will be (being suspended by benefit of clergy or other causes), is a good plea in bar to an indictment. And this depends upon the same principle as the former (that is, *autrefois acquit*), that no man ought to be twice brought in danger of his life for one and the same crime. Hereupon it has been held that a conviction of manslaughter, on an appeal or indictment, is a bar even in another appeal, and much more in an indictment for murder; for the fact prosecuted is the same in both, though the offences differ in coloring and degree."<sup>1</sup>

Whether the prisoner was convicted by his own confession or the verdict of a jury, the effect was the same, and he was equally secure against a second trial or any greater punishment than could be inflicted for the offence under the law as it existed when the act was done. This rule was in force at the date of the homicide for which Kring was sentenced, but had since been so changed as to deprive him of both the privileges which it conferred. The Constitution so varied the rules of evidence that what was conclusive proof of innocence of the higher grade of murder when the crime was committed — viz., a judicial conviction for a lower grade of homicide — was no longer admissible as evidence, or, if received, would not avail the accused. It also altered the pun-

<sup>1</sup> Bl. Com. bk. iv. p. 336. See *State v. Norvell*, 2 Yerg. (Tenn.), 24; *Campbell v. The State*, 9 Id. 333, 337.

ishment, because, as the law formerly stood, a man who was convicted of murder in the second degree could not be tried or punished by death for murder in the first degree; while by the new law he might be so punished, notwithstanding the previous conviction.

The Chief-Justice dissented on the following grounds: "It is the essential characteristic of an *ex post facto* law that it should operate retrospectively, so as to change the law in respect to an act of transaction already complete and past. Such is not the effect of the rule of the Constitution of Missouri now in question. As has been shown, it does not in any particular affect the crime charged, either in its definition, punishment, or proof. It simply declares what shall be the effect in the future of acts and transactions thereafter taking place. It enacts that any future erroneous and unlawful conviction for a less offence, thereafter reversed on the application of the accused, shall be held for naught, to all intents and purposes, and shall not, after such reversal, operate as a technical acquittal of any higher grade of crime, for which there might have been a conviction under the same indictment. It imposes upon the prisoner no penalty or disability. It cannot affect the case of any individual except upon his own request; for he must take the first step in its application. When he pleads guilty of murder in the second degree, he knows that its acceptance cannot operate as an acquittal of the higher offence. When he asks to have the conviction reversed, he understands that if his application is granted, the judgment must be set aside with the same effect as if it had never been rendered. It does not touch the substance or merits of his defence, and is in itself a sensible and just rule in criminal procedure. And 'so far as mere modes of procedure are concerned,' says Judge Cooley,<sup>1</sup> a party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place.

" . . . Precisely the same distinction between laws *ex post facto* and those which merely affect the remedy, and are there-

<sup>1</sup> Constitutional Limitations, 272.

fore applicable to the case of an offence previously committed, is well illustrated by the case of *Ratzky v. The People*.<sup>1</sup> There the prisoner had been convicted of murder in the first degree. The offence was committed when the act of 1860 was in force, which prescribed the mode of punishment; he was sentenced, however, in accordance with the terms of an act passed in 1862, subsequently to the commission of the offence, and which prescribed a different mode of punishment. On this account the judgment was held to be erroneous, and was reversed on the ground that the act of 1862 applied to offences previously committed, and was *ex post facto*. At the time of the commission in 1861, it was the well-settled law of New York, as decided in *Shepherd v. The People*,<sup>2</sup> that when a wrong judgment had been pronounced, although the trial and conviction were regular, the prisoner could not, on reversal of the judgment, be subject to another trial, but would be entitled to his discharge. But on April 24, 1863, after the prisoner had been tried and convicted, but before judgment and sentence were pronounced, an act of the legislature took effect, which provided that the appellate court should have power, upon any writ of error, when it should appear that the conviction had been legal and regular, to remit the record in which such conviction had been had, and to pass such sentence thereon as the appellate court should direct. But for the authority conferred by this act, the Court of Appeals stated that it would have had no power, upon reversal of the judgment of the Supreme Court, either to pronounce the appropriate judgment or remit the record to the Oyer and Terminer to give such judgment; but, on the contrary, would have been obliged to discharge him, the law not authorizing another trial. Nevertheless, the Court of Appeals gave effect to the act of 1863 as not being an *ex post facto* law. And yet it deprived the prisoner of the benefit of a rule of the law in force at the time the offence was committed; namely, that if he should be erroneously sentenced, and the judgment should be reversed, he would be entitled to be discharged, and forever after protected against

<sup>1</sup> 29 N. Y. 124.<sup>2</sup> 25 N. Y. 406.

further prosecution for the same offence, as well as against any second judgment upon the same verdict."

When such a difference of opinion exists among the judges, the public may think for themselves; and most persons would probably incline to the conclusion reached by the minority. The prisoner was not deprived of a defence in the ordinary sense of the term, and merely lost a benefit depending on unforeseen contingencies which he could not control. The effect of a plea of guilty of murder in the second degree in screening the accused from a conviction of murder in the first degree is due not to the prisoner's confession, but to its acceptance by the court, which is a public act, and may be regulated by the State. When, therefore, an amendment to the Constitution directly or indirectly provides that on the withdrawal of such a plea, or when it is set aside at the instance of the accused, the case shall stand as though the plea had not been made, and the accused elects not to abide by the plea, he cannot allege that the amendment is retrospective as to him, or that it deprives him of any right which has actually accrued. It seems to have been conceded that had the court below given leave to withdraw the plea, Kring might have been tried and convicted of murder in the first degree; and when the Supreme Court of Missouri reversed the sentence because the motion was not allowed, it in effect did what the court below had refused to do, and the plea should seemingly have been regarded as expunged from the record at the prisoner's request, and therefore as if it had never been made. In this aspect of the case it was independent of the change in the Constitution, and stood on the simple ground that a man cannot have the benefit of that which he has chosen to withdraw. When the conviction is set aside at the prisoner's request, it cannot be pleaded to a subsequent trial or indictment, nor can he complain of being again in jeopardy, because the act is virtually his own.

The common law rule that a person who has been convicted in due course of law by a jury legally called and impanelled shall not be again put in jeopardy for the same offence, has generally been regarded as a humane provision to protect the

accused from reiterated prosecutions, by which he might at length be overwhelmed;<sup>1</sup> and it is clear that as a conviction of manslaughter is an acquittal of murder, any law which abrogates the right to take advantage of it as a defence for past acts is necessarily *ex post facto*. The judgment in *Ratzky v. The People* is consistent with this view, because it did not authorize a new trial or deprive the prisoner of the right to plead *autrefois convict*, and simply directed the court below to enter the proper sentence on the verdict which the jury had pronounced. As Denio, C.-J., observed, "a person is said to be put in jeopardy only when he is a second time tried upon a criminal accusation; but the term has no relation to the reversal of an erroneous judgment and pronouncing a legal one pursuant to one legal conviction."

Whatever doubt may exist as to the above points, there should be none that a law reviving a liability which has been discharged by an act of amnesty or a repeal of the statute which rendered the offence criminal, is *ex post facto* and invalid;<sup>2</sup> and such also is the rule as regards a law rendering the accused answerable for an offence from which he has been exonerated by the lapse of the time prescribed by a statute of limitations.<sup>3</sup>

<sup>1</sup> Darby's Case, 4 Coke, 40; *Shepherd v. The People*, 25 N. Y. 406, 420.

<sup>2</sup> *The State v. Keith*, 63 N. C. 140; *Kring v. Missouri*, 107 U. S. 215, 231.

<sup>3</sup> *Moore v. The State*, 27 N. J. Law, 105; *The Commonwealth v. Duffy*, 96 Pa. 506; *The People v. Lund*, 12 Hun, 283.

## LECTURE XXVI.

The Prohibition of the *Ex post facto* Laws and Bills of Attainder binding on the States and the General Government. — That of Laws impairing the Obligation of Contracts only on the States. — Reasons for this Difference. — What constitutes a Contract in the Sense of the Prohibition. — A Grant to one Man may operate as a Contract with another who relies on the Expectation which it holds forth. — Contracts of Record and under Seal obligatory without a Consideration. — A Consideration requisite to Parol Contracts. — Judgments confessed, *Ex contractu*, and for Torts, and all Debts are within the Scope of the Prohibition. — Contracts of a State equally protected with those of Individuals. — Executed Contracts can no more be impaired than Executory. — The Grant of a Franchise a Contract. — Is a Consideration essential to the Grant of an Exemption from Taxation? — Such Exemptions must be for a Public Purpose.

THE main object of the Barons who met at Runnymede to confront John was to obtain safeguards against the royal power, which, owing to the twofold position of the Norman and Angevin sovereigns as feudal heads and conquerors, stood at a greater height in England than on the Continent of Europe.<sup>1</sup> They accordingly exacted a covenant that “no

<sup>1</sup> Every man born on English soil owed allegiance to the king, and was required to swear that he would be faithful to him as his lord; and the king had, in the organization of the counties, and in the sheriffs and justices, who were his deputies, a means of levying forces which might, when the popular heart was not estranged, counterbalance the power of the great nobles. (Calvin's Case, 7 Coke, 6 b; Freeman's Norman Conquest, iv. 245-259.) The command of a feudal superior, consequently, was not a justification for bearing arms against the Crown, and could not be pleaded as a defence to an indictment for treason. The Barons were thus compelled to vindicate the rights of the Commons in order to maintain their own, and a cause which might have led to despotism, became a spring of English freedom. Far different was the course of events in France, where the great nobles were secure in their own strength, and the sovereign had no direct right to the obedience of any one who did not hold immediately of him or had not agreed voluntarily to be his man. Hence a vassal might

free man shall be taken or imprisoned or disseized or outlawed or exiled or in anywise destroyed, nor will we go upon him or send upon him, save by the lawful judgment of his peers or by the law of the land." If this promise were fulfilled, no further guaranty would be requisite, because the barons composed the Parliament, and their meeting would be a safeguard, and not a menace. Such was the relative position of king, Parliament, and people until the close of the seventeenth century. The Petition of Right and the Bill of Rights, like Magna Charta, were designed as bulwarks against the Crown, and it did not occur to any one that it was possible or needful to set limits to the will of the nation as declared by the king, Lords, and Commons. The reign of George III. brought with it proofs that the Commons could act with as little regard to the rights of the subject and the freedom of speech as a king; but the efforts of Chatham, Burke, and Wilkes created a public opinion which controlled the House, and Parliament became a body to which Englishmen might securely confide their liberties and fortunes. No such confidence in the wisdom or impartiality of Parliament could well be felt during the eighteenth century in Ireland or America, where English legislation bore hardly on the manufacturing interests, with a view of preventing their growth and securing a market for English goods. Celt and Saxon were bitterly indignant in Ireland; but the wrong passed unheeded here, where more profitable sources of employment lay open on every side. It was not until Parliament asserted its omnipotence by claiming the right to tax, that the Colonists discovered that Magna Charta was not a safeguard against an assembly which wielded a more absolute authority than that claimed for the Crown by the most strenuous advocates of prerogative.<sup>1</sup> It was of

array his under-tenants against his lord, though he were the king, if there were no other means of obtaining justice; and they were bound to follow him to the field, on pain of forfeiting their land. *Etablissements de St. Louis. Boulainvilliers, Ancien Gouvernement de France, Lettre v. pp. 155, 173; ante, p. 24.*

<sup>1</sup> See Chatham's Speech in the Lords, January, 1775, Thackeray, *Life of Chatham*, ii. 281; *ante*, p. 167.

little consequence that the king could not levy ship-money or exact benevolences, if greater sums might be extorted legislatively by Parliament from a people who had no share in voting the tax or disposing of the money after it was raised. They only are truly free who are secure on every side, and cannot arbitrarily be deprived of any right that is essential to their happiness and welfare.

It may have been owing to these considerations, or because when sovereignty is transferred to the people guaranties are as much needed against its abuse as if it were left in the hands of a king, that the Constitution of Pennsylvania as framed in 1786 made the principles of Magna Charta a restraint on all the branches of the government, and shielded the citizen from oppression by the legislature as well as the executive. When, however, the Convention which sat in Philadelphia to frame the General Government came to consider what checks were requisite, it was deemed that the enumerated powers conferred on Congress could not readily be abused, and that in a country where property and respect for individual rights were generally diffused, life, liberty, and property would be sufficiently secure in the hands of representatives chosen by the people and under the constitutional guaranties devised by the several States.<sup>1</sup> There were, nevertheless, points where the interests of one class might be at variance with those of another, or sacrificed to the passions and prejudices of the hour. The right of ownership concerned every man, and was generally regarded as sacred; but the sanctity of contracts might be viewed differently by debtors and creditors, especially in periods of financial distress, when the means of payment could not readily be procured. Moreover, the course of events during the revolutionary war and subsequently, had shown that the State legislatures were only too ready to follow the precedent set by Parliament of condemning legislatively without a trial, or for acts that were not punishable when done.<sup>2</sup> Both points might have been covered by so moulding the clause

<sup>1</sup> See *ante*, p. 504.

<sup>2</sup> See *ante*, p. 546.

above cited from Magna Charta as to preclude any act on the part either of the States or of Congress that would operate as a deprivation without due process of law. The Convention, however, deemed it preferable to guard against the dangers which seemed imminent, by providing in the tenth section of the article that "no State shall pass a bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." The prohibition of *ex post facto* laws and bills of attainder has been already reviewed, and we have now to consider the remaining clause of the sentence. Taking the tenth section as a whole, it includes a large part of the ground covered by Magna Charta; but while it prohibits nothing which Magna Charta allowed, much that the latter forbade the king is left open to the States. If property could not be legislatively taken from a grantee and re-vested in the grantor consistently with the obligation of the grant viewed as a contract, it might, agreeably to the current of authority, be transferred to a third person, although such a course would manifestly be the deprivation without due process of law which Magna Charta condemns, and is now prohibited by the Fourteenth Amendment of the Federal Constitution.

The restraint under consideration does not apply to Congress. If they are under a disability, it is from a lack of power, or arises from the Fifth Amendment, and not from an express prohibition. This appears unmistakably from the instrument itself. The United States and the States are forbidden to pass bills of attainder and "*ex post facto* laws;" but the prohibition to impair the obligation of contracts is addressed solely to the States. There were good reasons for a distinction which at first sight might appear arbitrary. Contracts belong to the domain of State legislation, and are ordinarily beyond the jurisdiction of Congress, which cannot act upon or regulate them save incidentally and in the exercise of some power which has been conferred for national purposes; as, for instance, laying an embargo, enacting a bankrupt law, or fixing the standard of the coinage; and when such a case occurs, the contract obviously should not be allowed to

block the path of Congress.<sup>1</sup> It was, on the other hand, requisite to circumscribe the State legislatures, whose authority is general when not limited in terms, and might, if the Constitution of the United States did not intervene, be rendered despotic by abrogating the checks imposed by the existing organic laws. A convention chosen by the people of Pennsylvania or New York could, for instance, but for the restraint imposed by the federal bond, annul the franchises of every corporation within its jurisdiction by repealing the law which called it into being. Contracts might be rescinded or declared invalid without a hearing, or the means of enforcing them by suit withheld, and the power to enact insolvent laws so used as to defeat honest claims, although there were ample means of payment.

The prohibition of laws impairing the obligation of contracts may be considered under the following heads,—What constitutes a contract within the meaning of the constitutional prohibition? What is the obligation that may not be impaired? What laws impair the obligation? Is every act of a State government which frustrates or impairs a contract a law, or only such acts as are legislative? These inquiries, like other legal questions arising under the Constitution, must be answered in the light of the principles and practice of the English law, which the Colonists brought with them as a valued part of their inheritance.<sup>2</sup> If, for instance, the question be whether such a contractual obligation exists between a grantor and an innocent assignee from the grantee that the grant cannot be set aside as having been obtained fraudulently by the grantee, we shall find, on turning to the doctrines of equity as incorporated with the

<sup>1</sup> See *Hepburn v. Griswold*, 8 Wallace, 603; *Sinking Fund Cases*, 99 U. S. 718; *Mitchell v. Clark*, 110 Id. 634, 643; *Legal Tender Cases*, 12 Wallace, 457; 110 U. S. 421, 468. There could not well be a more flagrant violation of the principle of the prohibition than that practised in the case of *Mitchell v. Clark*, 110 U. S. 633, under color of an act of Congress, and tacitly sanctioned by the Supreme Court of the United States.

<sup>2</sup> See the opinion of Mr. Justice Bradley, in *Boyd v. The United States*, 116 U. S. 616, 624, 630.

common law, that redress cannot be had on such grounds after the estate has passed into the hands of a *bona fide* purchaser.<sup>1</sup> Such was in effect the decision in *Fletcher v. Peck*, although the grantor was a State and the point arose under an act passed to rescind a former legislative grant on the ground that the members were bribed.

A contract may be defined as a promise which is susceptible of being enforced by process. There can be no contract without a promise; but promises are not always technically contracts, even when so designed. Agreements which have no legal effect may concern the moralist, but have no place in a work on jurisprudence, except for the purpose of distinguishing them and pointing out the cause of their invalidity. If the term "contract" sometimes has a wider meaning, and includes agreements which are intended to be binding, whether they are or are not so in fact, such is not the sense in which it is used in a prohibition which was designed to preclude the States from impairing obligations that would otherwise be valid.

A promise may be obligatory under our law, as formerly at Rome, by reason of its form, or of the duty to compensate the person to whom it was made and who entered into a reciprocal engagement or acted on the faith of the inducement which it held forth. The stipulation of the Roman law belonged to the former category, and the innominate contracts to the latter; and a like distinction exists at common law where promises under seal and of record do not stand in need of a consideration, while parol contracts are invalid unless some act is done or forborne, or promise made as an equivalent.<sup>2</sup>

I may add that while a gift is an act rather than a contract, there is yet an implied undertaking on one side to bestow, and on the other to accept; and neither party can undo what has been done unless both agree.<sup>3</sup> So also the contract of the vendor to deliver, and of the buyer to pay, subsists after

<sup>1</sup> 6 Cranch, 87.

<sup>2</sup> Hare on Contracts, 102, 120.

<sup>3</sup> The Dartmouth College v. Woodward, 4 Wheaton, 518.

the right of property has passed by delivery or the execution of a deed, and will be violated by a law authorizing the resumption of the thing or retention of the price. It is, indeed, said in *Louisiana v. New Orleans*<sup>1</sup> that the "term 'contract' is used in the Constitution in its ordinary sense as signifying the agreement of two or more minds, for considerations proceeding from one to the other, to do or not to do certain acts. Mutual assent to its terms is of its very essence." A judgment for damages estimated in money is sometimes "called a contract of record, because it establishes a legal obligation to pay the amount recovered; and by a fiction of law a promise to pay is implied where such legal obligation exists." But this fiction cannot convert a transaction wanting the assent of the parties into one which necessarily implies it. Judgments for torts are consequently not contracts within the scope of a prohibition intended to secure the observance of good faith. "Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it, and no case arises for the operation of the prohibition."<sup>2</sup>

If this view is correct, the obligation to render back money paid under a mistake of fact is not a contract, because it may arise without assent and notwithstanding the dissent of the party bound.<sup>3</sup> Laying this aside, what authority is there for asserting as a general proposition that assent will not suffice in the absence of consideration? For centuries contracts have been classed as of record, under seal, and parol, and it is only in the last-mentioned case that a consideration has at any time been deemed requisite.<sup>4</sup> A man who went into court and confessed judgment, was bound, though he received nothing; and so where he put his seal to a writing. If these forms were observed, a consideration was not requisite; and it was not until a later period that a consideration would suffice without them, even when coupled with assent. We may therefore

<sup>1</sup> 109 U. S. 285, 288.

<sup>2</sup> *Garrison v. New York*, 21 Wallace, 203.

<sup>3</sup> *Hare on Contracts*, 233.

<sup>4</sup> *Taylor v. Root*, 4 Keyes, 344.

believe with Blackstone, as cited by Mr. Justice Harlan in dissenting from the view taken by the majority of the court in *Louisiana v. New Orleans*, that when "any specific sum is adjudged to be due from the defendant to the plaintiff on an action or suit at law, this is a contract of the highest nature, as being established by the sentence of a court of judicature."<sup>1</sup> To hold, as the majority would seem to have done, that an implied assent will not bring the case within the protection of the Constitution, would singularly restrict the operation of a clause which was designed to shield obligations from retro-active legislation.<sup>2</sup>

In dealing with a citizen, the State places itself on his level; and the contract must be judged by the rules which apply between individuals.<sup>3</sup> There may be a difference as regards the remedy, but the principles which govern the obligation are the same. The contracts of a State are consequently as much within the restraints imposed by the Constitution as if they were made by a private person. Though the federal courts have no jurisdiction of suits against a State, and cannot enforce the contract, they can

<sup>1</sup> Bl. Com. 465; *Louisiana v. New Orleans*, 109 U. S. 285, 293.

<sup>2</sup> A judgment confessed, or a recognizance, like a bond or due bill, is an implied promise to pay the amount admitted to be due, and belongs to the class of contracts which are binding from their form, independently of a consideration. If this remark does not apply to a judgment recovered adversely, it is still, whether the cause of action be *ex contractu* or *ex delicto*, an obligation in the sense in which the term is employed in the Institutes and the Constitution of the United States, and an undertaking for its fulfilment may be implied with more reason than when money is paid by mistake to a person who does not admit the error and claims to retain it as his own. We may consequently infer that wherever a debt exists by the fiat of the law or through the agreement of the parties, there is a contract which cannot constitutionally be impaired. 4 Bl. Com. 160; *Morse v. Toppan*, 3 Gray, 411; *Taylor v. Root*, 4 Keyes, N. Y. 344; *Maguire v. Gallagher*, 2 Sandford, 402; *Farmers' Bank v. Mather*, 30 Iowa, 283. See *Weaver v. Lapsley*, 43 Ala. 224, which, as cited in Black on Constitutional Prohibitions, sections 129, 130, holds that judgments are within the clause protecting the obligation of contracts, and *Rae v. Hulbert*, 17 Ill. 572, and *Spratt v. Reid*, 3 Green (Iowa), 489, which, agreeably to the same author, take the opposite view.

<sup>3</sup> *Murray v. Charleston*, 96 U. S. 432, 444.

take care that the State shall not directly, or through its officers or agents, do any act that will impair the obligation of the contract or prejudice the rights which it confers.<sup>1</sup> The doctrine of *Fletcher v. Peck* is sustained in this, as in other respects, by the subsequent course of decision.<sup>2</sup> A State cannot be compelled to execute its agreements; but if it appears in court as plaintiff, directly or through its officers or agents, and asks for judgment contrary to the letter or spirit of a contract which it has made with the citizen, and the defence is overruled, redress may be had through a writ of error to the Supreme Court of the United States; and so where an attempt is made to collect taxes which the State has agreed to forego,<sup>3</sup> or notwithstanding a tender of the amount due, in bonds or notes which it has promised to accept.<sup>4</sup>

In *Keith v. Clark*, an act of assembly passed in 1838 provided that the notes of the Bank of Tennessee should be receivable in payment of taxes and all moneys due the State. The plaintiff tendered certain notes which had been issued by the bank in 1861, during the rebellion, to a tax-collector, who refused to receive them on the ground that all such notes were, under a recent amendment of the Constitution of Tennessee, null and void. The court below decided that inasmuch as the State owned the entire stock of the bank and took all the profits, the notes were presumably issued with a view to the prosecution of the contest in which the State was then engaged with the General Government. This judgment was reversed by the Supreme Court of the United States. Agreeably to the view taken by that tribunal, the unlawful act of the State in waging war against the Union did not

<sup>1</sup> *Poindexter v. Greenhow*, 114 U. S. 270; *Royall v. Virginia*, 116 Id. 572; *Antoni v. Greenhow*, 107 Id. 769.

<sup>2</sup> *New Jersey v. Wilson*, 7 Cranch, 164; *Wolff v. New Orleans*, 103 U. S. 358; *Hartman v. Greenhow*, 102 Id. 672; *Poindexter v. Greenhow*, 114 Id. 270; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 Id. 650, 678; *Murray v. Charleston*, 96 Id. 432, 444.

<sup>3</sup> *McGee v. Mathis*, 4 Wallace, 156.

<sup>4</sup> *Antoni v. Wright*, 22 Grattan, 833; *Clarke v. Tyler*, 30 Id. 137; *Poindexter v. Greenhow*, 114 U. S. 270; *Royall v. Virginia*, 116 Id. 572; *Keith v. Clark*, 97 U. S. 454; *The Railroad Co. v. Loftin*, 105 Id. 260.

break the thread of its existence or preclude it from exercising its authority for lawful purposes. It was still the same political organization, and in contemplation of law subject to the obligations imposed by the Constitution of the United States. It might therefore adopt every measure requisite for the political well-being of its citizens as though war did not exist, and raise the necessary funds by taxation or in any other legitimate way. There was consequently no presumption that the notes in question were issued to aid the success of the rebellion, or with any view that the government of the State might not properly entertain. If such was the fact, it should be established by competent proof; and the invalidity of the notes would then follow as a legal inference. It followed that the amendment impaired the implied contract between the plaintiff and the State, and could not be upheld consistently with the Constitution of the United States.

Contracts between States are also protected by the constitutional safeguard, and neither party can, even by an act done in its sovereign capacity, vary the obligation which it has incurred.<sup>1</sup> The statute by which Virginia signified her assent to the separation of the district of Kentucky and its erection into a State, declared that "all private rights and interests in lands within the said district, derived from the laws of Virginia, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in Virginia." This provision was soon afterwards incorporated with the Constitution of Kentucky, and the Supreme Court held that the compact was irrevocable, and precluded the passage of any statute in conflict with its terms.

To bring a contract within the scope of the constitutional prohibition, it must be so far completed that it can be enforced by law; and until this point has been attained, it is subject to the control of the legislature, which may intervene to prevent the parties from completing what they have begun, or revoke any authority which has been conferred upon them

<sup>1</sup> *Green v. Biddle*, 8 Wheaton, 11.

for that end by the State.<sup>1</sup> An offer which has not been assented to, falls within this principle; and when a proposal has been made by or addressed to a municipal corporation, acceptance will come too late, after the repeal of the charter.<sup>2</sup>

In *Concord v. The Savings Bank*, an incorporated town voted to make a donation to a railway company if they would run their road through the streets. The company accepted the offer and complied with the terms; but during the interval between the acceptance and the construction of the road, the Constitution was amended, and prohibited such gifts. The court held that a State could not impair the obligation of a contract by altering its Constitution; but in this instance there was no contract, and consequently no obligation that could be injuriously affected by the change.

"The town," said Strong, J., "voted on the 20th day of November, 1869, that it would make a donation, provided the company would run its railroad through the town. On the 20th of June, 1870, the company gave notice of its acceptance of the donation. But the town was not empowered to make the donation until the road was located, and constructed through the town. It had no authority to make a contract to give. And the acceptance was an undertaking to do nothing which the company was not bound to do before the authority of the town to make a donation, or to engage to make a donation, came into existence. What is called the acceptance of the railroad company cannot be construed as an engagement to locate and build a railroad through the town. It amounted to no more than saying, 'If we build our road through your town, we will receive your gift.' There was, therefore, no consideration for the town's promise to give, even if the popular vote can be considered a promise."

This decision stands on its own ground, and will hardly serve as a precedent. The acceptance of the resolution was, according to the general use of language, not a declaration of the company's readiness to accept the money as a

<sup>1</sup> *Harshman v. Bates County*, 92 U. S. 569; *County of Bates v. Winters*, 97 Id. 83.

<sup>2</sup> *Concord v. The Savings Bank*, 92 U. S. 625.

gift, which might have been taken for granted had nothing been said, but a promise to do as the town desired, which rendered the contract mutual and beyond the reach of subsequent constitutional amendment. An offer made absolutely, and accepted or acted upon, constitutes a contract, whether it is worded as a law or in any other form.<sup>1</sup> A municipal corporation may consequently bind itself by an ordinance, which will, if so intended, operate as a contract with persons who act on the assurance which it holds forth, or may by a vote or resolution clothe its officers with power to contract for it; and if the former course is adopted, a resolution to subscribe to the stock of a banking or railway company becomes obligatory as soon as the company accepts it and notifies the town.<sup>2</sup>

It was accordingly held, in *Nugent v. The Supervisors*,<sup>3</sup> that an actual manual subscription is not indispensable, and that where an order for a certain number of shares of railroad stock is given by a county board, and accepted by the company, and the board is so informed directly or through the agent whom it employs, the minds of the parties meet, and the contract is complete.<sup>4</sup>

The letter and spirit of the constitutional prohibition alike require that it shall not cease to operate on the fulfilment of the contract, and shall, on the contrary, preclude any exercise of sovereign or legislative power tending to defeat the right or title which has been conferred, or to revest it in the grantor.<sup>5</sup>

An undertaking to do a thing means not only that the thing shall be done, but that, so far as the promisor is concerned, it shall stand. A contract for the sale of land is consequently as much within the safeguard of the Constitution,

<sup>1</sup> *The Railroad Co. v. Loftin*, 105 U. S. 260; *Louisiana v. Pilsbury*, Id. 286; *Nugent v. Supervisors*, 19 Wallace, 241.

<sup>2</sup> *County of Moultrie v. The Savings Bank*, 92 U. S. 631; *Bates County v. Winters*, 112 Id. 325.

<sup>3</sup> 19 Wallace, 241.

<sup>4</sup> *Bates County v. Winters*, 112 U. S. 325.

<sup>5</sup> *The Commonwealth v. The Pennsylvania Canal Co.*, 66 Pa. 41; *The City of Erie v. Canal Co.*, 59 Pa. 174.

after the execution of the conveyance, as it was before ; and the legislature can no more set aside the deed than they could have discharged the obligation to convey.

It is established, in accordance with these principles, that executed contracts are as strongly fenced against the power of the States as those which are still executory. Where there is a covenant to perform, followed by performance, this is too plain for controversy. Obviously, a law authorizing the covenantor to undo what he has done, or resume what he has transferred, would impair the obligation. And this is equally true when land is conveyed or goods delivered for value received without a formal or antecedent contract. Such a transaction is in effect a mutual agreement on one side to convey or deliver, and on the other to pay a stipulated amount ; and the legislature can neither reinstate the vendor, nor authorize the purchaser to recover back the price.

The doctrine was concisely stated in *Farrington v. Tennessee*.<sup>1</sup> "Contracts are executed or executory. A contract is executed where everything that was to be done is done, and nothing remains to be done. A grant actually made is within this category. Such a contract requires no consideration to support it. A gift consummated is as valid in law as anything else."<sup>2</sup> An executory contract is one where it is stipulated by the agreement of minds, upon a sufficient consideration, that something is to be done or not to be done by one or both the parties. Only a slight consideration is necessary ; see *Pillans v. Van Mierop*,<sup>3</sup> *Forth v. Stanton*,<sup>4</sup> and the cases there cited. The constitutional prohibition applies alike to executory and executed contracts, by whomsoever made. The amount of the impairment of the obligation is immaterial. If there be any, it is sufficient to bring into activity the constitutional provision and the judicial power of this court to redress the wrong."<sup>5</sup> Grants are

<sup>1</sup> 95 U. S. 683.

<sup>2</sup> *Dartmouth College v. Woodward*, 4 Wheaton, 518.

<sup>3</sup> 3 Burrow, 1663. See 2 American Leading Cases (5th ed.), 322.

<sup>4</sup> 1 Saund. 210, note 2.

<sup>5</sup> *Von Hoffman v. City of Quincy*, 4 Wallace, 535.

consequently as much within the constitutional safeguard as agreements to sell or convey; and the legislature cannot re-vest the title in the grantor, or, as it would seem, transfer it to a third person, consistently with the obligation which they are forbidden to impair.

The question arose in *Fletcher v. Peck*.<sup>1</sup> Land was granted by the State of Georgia, and the legislature attempted to set aside the deed on the ground of fraud, after the premises had been conveyed to an innocent purchaser. The case was brought before the Supreme Court by writ of error. Chief-Justice Marshall said, in delivering judgment, that a contract did not cease to be one, or fall without the meaning of the Constitution, on being executed. Contracts were either executed or executory. An executory contract was one by which a party undertook to do or not to do a particular thing. An executed contract was one in which the object of the contract was performed. The difference was chiefly this,—that one conferred a chose in action, the other a vested right or chose in possession. A grant was therefore a contract executed, imposing a continuing obligation on the grantor, which would be violated if the right of the grantee was disturbed; and since the Constitution used the generic term “contract,” it must be viewed as including executed agreements as well as those which have not been carried into effect. A law rescinding a conveyance, and declaring that the grantor should stand seized of his former estate, notwithstanding the grant, would be as repugnant to the Constitution as a law discharging a vendor from the obligation to execute the contract by a deed. It would be strange if a contract to convey was secured by the Constitution while an absolute conveyance remained unprotected. There was no distinction between grants made by a State and a grant made by an individual. Both were contracts, and neither could be impaired consistently with the Constitution.

The prohibition does not become inoperative on the transfer of the contract, property, or franchise to a third person, and may, on the contrary, inure to his benefit where it would

<sup>1</sup> 6 Cranch, 87.

not have protected the original covenantee or grantee.<sup>1</sup> There are, under these circumstances, two contracts, — one express between the original parties, the other implied from the money paid, or acts done by the assignee in the belief that he will acquire a valid title by the transfer; and the latter may be obligatory, although the former was vitiated by fraud and might have been set aside. Such was the decision in *Fletcher v. Peck*, and it is based on the well-known principle that an equity cannot be enforced against a *bona fide* purchaser.

The rule that a franchise can no more be impaired to the prejudice of an assignee than of the party on whom it was originally conferred, was applied in *The Commonwealth v. The Pennsylvania Canal Co.*,<sup>2</sup> where the State of Pennsylvania sold her public works, including a canal and a dam across the Susquehanna River which was used to feed the canal, to a railroad company, which subsequently conveyed the canal and dam to another company; and it was held that the legislature could not require the latter company to open a sluice in the dam for the passage of fish. The case of *The City of Erie v. The Erie Canal Co.*<sup>3</sup> is to the same effect.

For like reasons, an act declaring that the negotiable bonds or notes of a public or private corporation shall be received in payment of dues or taxes, may take effect as a contract with one to whom the instrument is subsequently issued or transferred, which binds the State and renders the act irrevocable.<sup>4</sup> In the case last cited, the court relied on the case of *Woodruff v. Trapnell*,<sup>5</sup> where a statutory provision that the bills and notes of the Bank of Arkansas, the capital of which belonged to the State, should "be received in all payments of debts due to the State of Arkansas," was held to be a contract with the holders of such notes which bound the State and could not be annulled, as it regarded notes

<sup>1</sup> *Thompson v. Perrine*, 103 U. S. 806; *Hartman v. Greenhow*, 102 Id. 672.

<sup>2</sup> 66 Pa. 41.

<sup>3</sup> 59 Pa. 174.

<sup>4</sup> *Louisiana v. Pilsbury*, 105 U. S. 286; *Keith v. Clark*, 97 Id. 454; *Hartman v. Greenhow*, 102 Id. 679.

<sup>5</sup> 10 Howard, 190.

already issued, by repealing the provision. "The notes," said the court, "are made payable to bearer; consequently every *bona fide* holder has a right, under the 28th section" (the one making the notes receivable for dues to the State), "to pay the State any debt he may owe it in the paper of the bank. It is a continuing guaranty by the State that the notes shall be so received. Such a contract would be binding on an individual, and is not the less so on the State. And that the legislature could not withdraw this obligation from the notes in circulation at the time the guaranty was repealed, is a position which can require no argument." In *Furman v. Nichol*,<sup>1</sup> a similar provision in an act of Tennessee, declaring that certain notes of the bank of that State should be "receivable" at the Treasury of the State, and by tax-collectors and other public officers, "in all payments for taxes and other moneys due the State," was held to constitute a valid contract between the State and every person receiving a note of the bank. An attempt was made to restrain the operation of the guaranty to the person who received the note in the course of his dealing with the bank; but the court said, "The guaranty is in no sense a personal one. It attaches to the note, is part of it, as much so as if written on the back of it, goes with the note everywhere, and invites every one who has taxes to pay to take it."<sup>2</sup>

In these instances the stipulation was express; but it is a general principle that what is given may be transferred, and shall be as available to the assignee as it was to the original grantee. The question is nevertheless one of intention, depending on the nature and language of the grant. An exemption from taxation is ordinarily confined to the company or individual on whom it is bestowed, and is insusceptible of alienation,<sup>3</sup> but may, notwithstanding, be annexed to the land or franchise, and run with it to assignees and purchasers.<sup>4</sup>

<sup>1</sup> 8 Wallace, 44.

<sup>2</sup> See 4 Wallace, 143; 2 American Leading Cases, 340, 344; *Russell v. Wiggin*, 2 Story, 313.

<sup>3</sup> *Morgan v. Louisiana*, 93 U. S. 217; *The Railroad Co. v. Gaines*, 97 Id. 711.

<sup>4</sup> *McGee v. Mathis*, 4 Wallace, 143.

A man who buys land on the faith of a statutory assurance that it shall not be taxed, is as much entitled to enforce the contract as if it were made directly with him;<sup>1</sup> and so of the purchase of bonds under an authority conferred by a statute which provides for the laying and collection of a tax as a means of payment.<sup>2</sup> So in *McGee v. Mathis*,<sup>3</sup> an act was passed providing for the drainage and sale of certain lands belonging to the State, and that the scrip issued to the contractors who did the work should be receivable in payment for the lands, which were by the same act declared to be "exempted from taxation for ten years, or until they should be reclaimed." The plaintiff became a holder of the scrip and purchaser of the land, and it was held that the statute operated as a contract between him and the State, which would be violated by the repeal of the act or the imposition of a tax.<sup>4</sup>

<sup>1</sup> *The Railroad Co. v. Loftin*, 105 U. S. 260.

<sup>2</sup> *Louisiana v. Pilsbury*, 105 U. S. 285.

<sup>3</sup> 4 Wallace, 143.

<sup>4</sup> "When the scrip was issued to a contractor, it represented a certain quantity of land untaxable for ten years, unless the land should be sooner made fit for cultivation. When transferred to another person it represented to him a like quantity of like land. The contract of the State was to convey the land for the scrip, and to refrain from taxation for the time specified. Every piece of scrip was a contract between the State and the original holder and his assigns. Now what was the effect of that contract when made? Did it not bind the State to receive the scrip in payment for swamp-land exempted for a limited time from taxation? The scrip, if not receivable for lands, was worthless. To annul the quality of receivability was to annul the contract. But the exemption of the lands for which it was receivable from taxation was a principal element in its value, and repeal of the exemption was the destruction of this element of value. This was clearly an impairment of the contract. The State could no more change the terms of the contract by changing the stipulated character of the land to be conveyed in satisfaction of the scrip as to liability to taxation, than it could abrogate the contract altogether by refusing to receive the scrip at all in payment for land. We are constrained to regard the repeal of the exemption act, so far as it concerns lands paid for, either before or after the repeal, by scrip issued and paid out before repeal, as impairing the contract of the State with the holders of the scrip." *McGee v. Mathis*, 4 Wallace, 143.

The hardship or inequality of an agreement, or the fact that it is unilateral and imposes no duty on the covenantee, will not authorize a disregard of the constitutional prohibition. Such reasons may avail to show that a contract is invalid legally or on equitable grounds, but have no bearing when the question is whether a valid contract can be impaired retroactively by legislation. Some recent decisions might seem to indicate that a consideration is requisite to bring a contract within the scope of the Constitution of the United States,<sup>1</sup> but may be thought to stand on a different basis. No one contends that a gift of land by a State or an individual, made legislatively or under seal, can be revoked because there is no mutual obligation; and a covenant to give is within the principle. So the grant of a franchise — as, for instance, of the right to be a body corporate and engage in trade and share the profits without individual liability in the event of loss — is equally secure. There is under such circumstances no consideration, because the grantees are to render nothing to the grantor, and cannot be compelled to exercise the privilege; and if the corporation may be dissolved for “non-user,” it must be through a *quo warranto* instituted by the attorney-general, and not by a legislative act.

It results from what has been said that the rule is the same as regards executed contracts and contracts authenticated by a seal, whether the transaction is gratuitous, or based on a valuable consideration; and voluntary deeds and gifts perfected by delivery are consequently as much within the constitutional safeguard as if the grantee were a purchaser for value. Every such transfer may be resolved into an undertaking by one party to bestow, and by the other to accept; and the donor cannot disturb or oust the donee consistently with the implied agreement. The doctrine of consideration is not universal, even at common law, and applies only to executory parol contracts.<sup>2</sup> “Even,” said Sharswood, J., in *The*

<sup>1</sup> See *Louisiana v. New Orleans*, 109 U. S. 285, 288, 292.

<sup>2</sup> *The City of Erie v. The Erie Canal Co.*, 59 Pa. 174, 177; *The Commonwealth v. Pennsylvania Canal Co.*, 66 Pa. 41; *The Commercial Bank of Natchez v. Chambers*, 8 Smedes & Marshall, 9; *Taylor v. Root*, 4 Keyes, 344.

*City of Erie v. The Erie Canal Co.*, "when the State parts with its property to a corporation by a gift, it is an executed grant, — a contract within the meaning of the Constitution which cannot be subsequently revoked or impaired."

While such is the general rule, some recent decisions treat a consideration as essential to the validity of executory public contracts, in language which implies that it is not less requisite when private interests are alone involved. In *Farlington v. Tennessee*,<sup>1</sup> Waite, C.-J., declared that the executory contracts of a State, like the executory parol contracts of an individual, stand in need of a consideration, though made by the legislature with all the formalities requisite for the passage and authentication of a statute; and it has been held to follow that a law containing an exemption from taxation or any other stipulation in favor of a natural or an artificial person, may be repealed unless value is given or some act done or liability incurred on the faith of the grant.

The key-note of this doctrine was struck as far back as *Lord v. Litchfield*,<sup>2</sup> when Carpenter, J., said: "The statute of 1702, so far as it relates to the present inquiry, is as follows: 'That all such lands, tenements, hereditaments, and other estates that either formerly have been, or hereafter shall be, given and granted, either by the General Assembly of this Colony, or by any town, village, or particular person or persons, for the maintenance of the ministry of the Gospel in any part of this Colony, or schools of learning, or for the relief of poor persons, or for any other public and charitable use, . . . shall also be exempted out of the general lists of estates and free from the payment of rates.'

"We are clearly of the opinion that the act of 1702 is in no sense a contract. A public as well as a private statute may form the basis of a contract. In either case, as in contracts between individuals, there must be all the essential elements of a contract, — a subject-matter, parties capable of contracting, a good and sufficient consideration, and an actual contract or agreement of minds. If any one of these requisites is wanting, there is no more reason for holding the State

<sup>1</sup> 95 U. S. 685.

<sup>2</sup> 36 Conn. 124-126.

bound by the transaction than there would be for holding an individual bound under similar circumstances."

It has been held, conformably to this view, that when the statute which is relied on for the exemption confers no property or franchise, and does not expressly or by implication operate as an inducement to the grantee or to third persons to expend money or enter into obligations on the faith of the privilege which it confers, it will be regarded as a declaration of the legislative will or purpose that may be recalled at pleasure.<sup>1</sup>

In *Tucker v. Ferguson* a statute exempting certain lands from taxation was accordingly held not to be obligatory as a contract, because there was no equivalent for the concession made by the State. "The company was required to do nothing, and did nothing, in return. As between individuals, the stipulation would belong to the category of nude pacts. It has no higher character because one of the parties was a State, the other a corporation, and it was put in the form of a statute. It was the promise of a gratuity spontaneously made, which might be kept, changed, or recalled at pleasure. The case of *Christ Church Hospital v. The County of Philadelphia*<sup>2</sup> is instructive upon this subject. In 1833 the legislature of Pennsylvania passed an act declaring 'that the real property, including ground-rents, now belonging to Christ Church Hospital, in the city of Philadelphia, so long as the same shall continue to belong to said hospital, shall be and remain free from taxes.' In 1853 a law was passed which subjected the ground-rents to taxation. The Supreme Court of the State sustained the validity of the latter act. The hospital removed the case, by a writ of error under the twenty-fifth section of the Judiciary Act of 1789, to this court. Here it was insisted that the act of 1833 was a contract in perpetuity, and the contract clause of the Constitution of the United States was invoked for its protection.

<sup>1</sup> See *Tucker v. Ferguson*, 22 Wallace, 574; *West Wisconsin R. R. Co. v. The Supervisors*, 93 U. S. 595.

<sup>2</sup> 24 Howard, 301.

This court unanimously affirmed the judgment of the Supreme Court of the State.

"The taxing power is vital to the functions of government. It helps to sustain the social compact and to give efficacy. It is intended to promote the general welfare. It reaches the interests of every member of the community. It may be restrained by contract in special cases for the public good, where such contracts are not forbidden. But the contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists it is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require. It is in derogation of public right, and narrows a trust created for the good of all."<sup>1</sup>

The language held in this instance would seem too broad, both as regards the law of contracts generally, and their status under the Constitution of the United States. No one will contend that a voluntary covenant by an individual to pay a sum certain, or to do or to refrain from any other act or thing, is invalid, or that it can be retroactively impaired; and an assurance duly given by the legislature and confirmed by the executive is not less obligatory than a covenant, and does not stand in need of a seal. If a consideration were essential to the obligation of a private contract, it would not be so when the legislature is the donor, and may dispense with form. What *Tucker v. Ferguson* establishes is, that an act exempting the property of a natural or artificial person from taxation being, like a license, a declaration of the benefactor's will or purpose in a matter which is wholly under his control, may ordinarily be repealed at pleasure, and that to render such a boon irrevocable it must be coupled with, or incident to, a grant of some right or interest which is accepted in the belief that the privilege will not be withdrawn.<sup>2</sup>

<sup>1</sup> *Home of the Friendless v. Rouse*, 8 Wallace, 432; *Washington, etc., v. Rouse*, Id. 439.

<sup>2</sup> *The People v. Roper*, 35 N. Y. 629; *Branson v. The City of Philadelphia*, 47 Pa. 330.

The doctrine was accurately stated by Wayne, J., in *Christ Church v. The City of Philadelphia*.<sup>1</sup> "The plaintiffs claim that the exemption conceded by the act of 1833 is perpetual, and that the act itself is in effect a contract. This concession of the legislature was spontaneous, and no service or duty or other remunerative condition was imposed on the corporation. It belongs to the class of laws denominated *privilegia favorabilia*. It attached only to such real property as belonged to the corporation and while it remained as its property; but it is not a necessary implication from these facts that the concession is perpetual, or was designed to continue during the corporate existence."

This interpretation puts a salutary check on the power of the State legislatures to bind posterity in a matter so essential to the public welfare as the collection of the revenue, without involving the indefensible proposition that contracts which are not sustained by a consideration have no obligation, or none that is recognized by the Constitution of the United States.

It is at the same time clear that a contract cannot exist in the absence of a promise given on one side and assented to on the other, or, in other terms, without an engagement intended to be irrevocable, and so understood and accepted. *Prima facie*, a statute is a rule of action which binds the governed, while leaving the sovereign free to act as circumstances may require;<sup>2</sup> and if the State can part with any portion of the authority which has been conferred upon her for the common good, the intention to do so must be explicitly declared.<sup>3</sup> When, however, it appears unmistakably that the object is to induce the expenditure of money or the acceptance of a charter which might otherwise be refused, it will operate as a contract, and cannot be retracted to the injury of the citizen. A charter stipulating that a certain tax should be in

<sup>1</sup> 24 Howard, 302.

<sup>2</sup> See 1 Bl. Com. 45; *Lord v. Litchfield*, 11 Conn. 251, 266.

<sup>3</sup> *Branson v. Philadelphia*, 47 Pa. 329, 338; *Erie Railway Co. v. The Commonwealth*, 66 Pa. 84; *Union Railway v. Philadelphia*, 83 Pa. 429, 433; *The People v. Roper*, 35 N. Y. 629.

lieu of all others, is accordingly obligatory on succeeding legislatures, and a statute imposing a greater burden will be invalid, whether the tax is laid on the stockholders or directly on the corporation.<sup>1</sup>

The judgment in *Tucker v. Ferguson* seems irreconcilable with the language held in *The Home of the Friendless v. Rouse*,<sup>2</sup> where it is clearly shown that a statutory grant or contract requires no other consideration than the public good, which every legislative act is presumably designed to promote, and that the inquiry should be, Did the legislature intend to enter into an irrevocable agreement, and were the circumstances such as to justify the concession? To employ public means for private ends is contrary to the first principles of government; and it is immaterial whether the wrong is done through an appropriation of money in the treasury, or takes the form of a contract not to replenish the treasury, by requiring a company or an individual not to bear their share of the common burden. The question would therefore seem to be not so much one of consideration as of cause. A gratuitous exemption from taxation is inoperative, for reasons akin to those which prevail in the case of agreements in restraint of trade.<sup>3</sup> A naked covenant not to exercise a trade or calling imposes an injurious restraint on one party without benefiting the other, and is therefore contrary to public policy and void. If, however, the transaction is shown to be a sale of the goodwill of the covenantor's business, the objection is obviated and the contract may be enforced. So a contract not to tax is *prima facie* invalid, as depriving the State of a source of revenue and increasing the burdens of other tax-payers, unless it is made in furtherance of some useful purpose that will compensate the community for the loss.

In like manner, the grant of an exclusive right to construct a bridge or railway may be valid as an inducement to the

<sup>1</sup> 95 U. S. 685.

<sup>2</sup> 8 Wallace, 435.

<sup>3</sup> *Mitchell v. Reynolds*, 1 P. Williams, 181; 1 Smith's Leading Cases (8th Am. ed.), 769, 777; Hare on Contracts, 187; 2 Wharton on Contracts, sect. 1064.

expenditure of capital for public use ; because, as in the case of a similar grant of a ferry, it is better to have a single means of crossing a river than none.<sup>1</sup> The grant of such a monopoly, after the road or bridge has been built, is a restraint on trade without an equivalent, and therefore void.<sup>2</sup> What the authorities as a whole may be regarded as establishing, is, that as private property cannot be taken except for public purposes, so public rights cannot be surrendered for merely private purposes ; where there is no public use, the grant will be void.

“The object for which The Home of the Friendless was incorporated,” said Davis, J., “was to enable those persons of the female sex who were desirous of establishing a charitable institution in St. Louis for the relief of destitute and suffering females, to carry out their laudable undertaking. It can readily be seen that a charity of this kind would be of great benefit to the people of St. Louis, and that the legislature of the State would naturally be desirous of using all proper means to promote it. The purposes to be attained by such a charity are usually beyond the ability of individual effort, and require an association of persons who will themselves contribute pecuniary aid, and are willing to become solicitors for the contributions of others. Usually the initiation of such an enterprise is in the hands of a few persons, who need to be clothed with more than ordinary powers in order to obtain the successful co-operation of others. In no way could this co-operation be better secured than by conferring on the corporators the authority to say to the benevolent people of St. Louis that their donations in money or lands for the relief of the suffering female poor of the city would be held by the institution undiminished by taxation. . . .

“There is no necessity for looking for the consideration of a legislative contract outside of the objects for which the corporation was created. These objects were deemed by the legislature to be beneficial to the community, and this benefit

<sup>1</sup> The Binghamton Bridge, 3 Wallace, 51.

<sup>2</sup> See *Johnson v. Crow*, 87 Pa. 184 ; *Gordon v. Winchester*, 12 Bush, 111.

constitutes the consideration for the contract, and no other is required to support it. This has been the well-settled doctrine of this court on this subject since the case of *Dartmouth College v. Woodward*. This case is so far unlike *Lord v. Litchfield* that the privilege was conferred in the one by the charter of incorporation, and arose in the other from a statute which had been enacted long before, and embraced all charitable and learned institutions; but large sums had been contributed in both instances in the belief that the exemption was irrevocable, and it could not therefore be repealed in either, consistently with justice or the guaranty afforded by the Constitution of the United States. Where a license or other declaration of the grantor's purpose is so worded as to induce the grantee or third persons to give value in the belief that it will not be recalled, an obligation arises by estoppel which no subsequent legislation can impair."<sup>1</sup>

<sup>1</sup> See *Branson v. Philadelphia*, 47 Pa. 329; 2 *American Leading Cases*, 340, 555 · *Rerick v. Kern*, 14 S. & R. 267.

## LECTURE XXVII.

A Charter of Incorporation is a Contract which may not be impaired. — The Effect of the Police Power in modifying this Rule. — The Legislature may regulate Bodies Corporate as well as Natural Persons, and prohibit the Exercise of a Franchise which proves Injurious. — Existing Remedies may be varied, and new Remedies given to and against Corporations. — Rule in Pennsylvania. — Irrevocable Exemptions from Taxation. — Exclusive Right to supply Gas or Water, or to build a Bridge or Railroad. — What Sovereign Powers may be irrevocably conferred on Corporations. — The Legislature cannot alienate the Police Power or the Right of Eminent Domain. — Incorporated Companies subject to Prohibitory Legislation even when the Effect is to preclude them from pursuing the Business for which they were chartered. — A Cemetery Company may be prevented from interring, or a Manufacturing Company from working, in the Way or Place designated in their Charter. — Police power must not be exercised without sufficient Cause.

AGREEABLY to the uniform course of decision in the United States, a legislative grant of a franchise, — as, for instance, a bridge, a ferry, or the right to be a body corporate, — is as strongly fenced by the safeguard of the Constitution as a grant of land or other corporeal hereditament. The point arose in the leading case of the *Dartmouth College v. Woodward*.<sup>1</sup> Dartmouth College had been incorporated by a charter from the Crown before the Revolution. In the year 1816 the legislature passed a law by which the corporate property and franchises were virtually taken from the persons in whom they were vested under the charter, and conferred on other persons designated by the act. The validity of this law was upheld by the Supreme Court of New Hampshire, and a writ of error taken from their decision to the Supreme Court of the United States. The case was argued with great ability by Mr. Webster. He contended that a grant of corporate powers and privileges was as much a con-

<sup>1</sup> 4 Wheaton, 518.

tract as a grant of land. What proved all charters of this sort to be contracts, was that they must be accepted to give them force and effect: if not accepted, they were void; and if a new charter was given to an existing corporation, it might even accept part and reject the rest. In the *King v. Dr. Askew*<sup>1</sup> it was said that "the Crown cannot oblige a man to be a corporator against his will. He shall not be subject to the inconveniences of it without accepting it or assenting to it." These terms, "acceptance" and "assent," were the very language of contract. In *Ellis v. Marshall*<sup>2</sup> it had been expressly adjudged that naming the defendant among others in an act of incorporation did not of itself make him a corporator, and that his assent was necessary to that end. Charters of incorporation partook therefore of the nature of contracts, and could not be altered or varied without the consent of the original parties. This argument was sustained by another of equal weight. If there was no consideration between the legislature and the corporators, there would still be one among the corporators. Where a number of persons agree to act together, the promise of each one is a consideration for the promise of each of the others. They are all, consequently, bound to the opposite party to the contract, and he to them. An agreement by two or more creditors to release the debtor upon certain terms, is obligatory as between themselves, and may be enforced by the debtor, although no consideration moves from him. In like manner, if a number of persons agree to place money in the hands of a trustee for the endowment of a school, church, or other public institution, the trustee may enforce the performance of the agreement, and the contributors will have a corresponding remedy against him. This principle is obviously applicable to corporators engaged in a common enterprise on the faith of a charter granted by the legislature.

The argument of Mr. Webster was adopted and enforced by Chief-Justice Marshall. The Constitution did not intend to restrain the legislatures of the States in the exercise of the powers necessary to government. When the act of incorpo-

<sup>1</sup> 4 Burr, 2200.

<sup>2</sup> 2 Mass. 279.

ration was a grant of political power, when it created a civil institution for municipal purposes in which the public alone were concerned, the legislature might revoke or alter what they had done. Under these circumstances the end in view was the administration of the government, the charter of incorporation a means by which the end was obtained. When, however, the corporation was merely private in its own character, and created as a recipient and trustee of funds contributed by the State or by individuals, the mere circumstance that those funds were to be applied to purposes in which the public had an interest, — the diffusion of learning, the promotion of religion, or the relief of distress, — would not render the corporation public, or bring it within the control of the legislature.

It is also established by this case, conformably to the recognized principles of public law, that a government inherits and is bound by the obligation of its predecessors even when it has arisen through their overthrow, and rests upon a different basis; or, more accurately speaking, that each successive government represents the nation, which is consequently bound to fulfil the contracts that it has made, notwithstanding any change in laws or institutions. The charters granted and privileges conferred and obligations incurred by the Crown or by the Colonial legislatures, were consequently unaffected by the Declaration of Independence, and became binding on the States when subsequently organized.

As a State cannot repeal the charter of a private corporation, so it cannot impose restrictions which render it less beneficial to the corporators. In the *City of Erie v. The Erie Canal Co.*,<sup>1</sup> the charter of a company gave them the right to a canal which had been constructed by the State; and it was held that they could not legislatively be compelled to build bridges over the canal at the points where it intersected the public highways. The act was not a valid exercise of the power of taxation, because it charged the company with the entire cost of a work which concerned the community as a

<sup>1</sup> 59 Pa. 174.

whole, and it impaired the obligation of the contract by imposing a liability not specified in the original grant. Sharswood, J., said that the legislature might lay a duty on a municipal corporation because it was a public agent, but that a private corporation could not be subjected to any burden that was not named in the charter or that could not be deduced legitimately from its language.

It does not vary the case that the proposed change is slight and presumably will not have an injurious effect on the corporation, because the State is bound to keep each and every part of the agreement.<sup>1</sup> It has accordingly been determined that the legislature cannot tamper with the franchises of a turnpike company by directing the removal of a toll-gate on the ground that it obstructs the highway and is injurious to private property. If such a gate is so placed as to be a nuisance, relief must be sought in the courts, and not through a legislative decree. So where the act of incorporation prescribes the mode of electing the president and directors, another mode cannot be substituted with the effect of enabling a minority of the stockholders to choose the officers, and indirectly to control the affairs of the corporation;<sup>2</sup> and an act taking a charitable institution out of the hands of the trustees designated by the charter and subjecting it to the control of third persons, is within the same principle.<sup>3</sup> It is immaterial that the institution was established from benevolent motives and without a view to gain, because the founders are equally entitled to require that it shall be managed and their bounty applied in the manner and for the objects which they contemplated. Whether a grant is gratuitous, or for a valuable consideration, it cannot take effect without the implied or express assent of the grantee. A gift is consequently a contract, depending on the intention of the donor to confer, and on the consent of the donee to receive. As such, it is protected by the Constitution of the United States.

Corporations are nevertheless as much under the control

<sup>1</sup> *Green v. Biddle*, 8 Wheaton, 2.

<sup>2</sup> *Hays v. The Commonwealth*, 82 Pa. 518.

<sup>3</sup> *Brown v. Hummel*, 6 Pa. 86.

of the government as natural persons, and may be subjected to any burden or regulation which could legally be laid on an individual; and the legislature may consequently provide new means of enforcing the duties which a body corporate owes to the public, or redressing the injuries occasioned by its acts or laches.<sup>1</sup> A corporation can therefore no more object to a remedial statute on the ground that the method which it prescribes is novel, than it can object on a like ground to the imposition of a tax. An act authorizing a foreclosure and sale under a railway mortgage may consequently be valid, although the mortgage provides that the mortgagee may enter on default and take the tolls, because a stipulation for a particular remedy will not preclude the legislature from conferring another which is more stringent or effectual.

So it was held in Long's Appeal<sup>2</sup> that the Pennsylvania Railroad Company could not resist the plaintiff's claim to have the damages which he had sustained by the taking of his land assessed by a jury, on the ground that the company took their charter under the existing law, which left the question of compensation to viewers appointed by the judges, and that a different mode of trial could not be substituted to their prejudice. The court said that the rights of artificial persons were not more sacred than those of natural persons, and that while the legislature could not impair either, it might regulate both, and provide the mode in which they should be enforced. Corporations stood on no higher plane in this regard than individuals, and neither had an absolute or vested title to the remedies by which their rights were secured or obligations enforced. Every contract was made in view of the laws then existing for the enforcement of contracts, so that they were, in one sense, part of the contract; and yet such laws might be amended, or even repealed, if others looking to the same end were substituted. In like

<sup>1</sup> McCurdy's Appeal, 65 Pa. 290; McElrath v. Taggart, 55 Id. 189; Long's Appeal, 87 Pa. 114; Union Canal Co. v. Gilfillin, 93 Pa. 95; Sanders v. The Insurance Co., 44 N. H. 238; Louisville County v. Ballard, 2 Metcalf (Ky.), 165.

<sup>2</sup> 87 Pa. 114.

manner, the statutes which have within the last few years given a right to sue for the damages resulting from a death caused by negligence, are valid as regards pre-existing corporations; and such we may believe should also be the rule with regard to statutes requiring railway companies and other bodies corporate to pay for property injured or destroyed in the exercise of the right of eminent domain. If, as is established, the legislature may, by virtue of the police power, forbid an existing corporation to use an injurious chartered privilege, although the effect is to frustrate the purpose for which it was created,<sup>1</sup> they may equally well provide that such privileges shall not be used injuriously without compensating the persons who suffer from the act.<sup>2</sup>

Agreeably to the view taken in Pennsylvania, the grant of a charter for a railway is a contract not only that the company may take land on compensating the owner without liability to third persons, but that they shall not be answerable, in the absence of negligence, for the injurious consequences of any act done in the construction or operation of the road, although the effect is to flood the land of a neighboring proprietor, or to blacken or consume his trees, buildings, and fences with the smoke and sparks emitted by the locomotives, and would be a nuisance at common law. A subsequent act of assembly or constitutional amendment intended to afford a remedy for such injuries is consequently invalid, as impairing the obligation of the contract. The reason assigned for a conclusion which seems at variance with natural right is, that while compensation must be given for property taken in the exercise of eminent domain, none is due for property injured or destroyed, and that as the State would not be liable if she made and worked the road directly, the company must be equally exempt.<sup>3</sup>

<sup>1</sup> *The Beer Co. v. Massachusetts*, 97 U. S. 25; 109 Id. 667.

<sup>2</sup> See *ante*, p. 421.

<sup>3</sup> See *The Philadelphia & Trenton R. R. Co.*, 6 Wharton, 35, 44; *Monongahela Navigation Co. v. Cowes*, 6 W. & S. 101; *Commonwealth v. Reed*, 34 Pa. 275; *McKeen v. The Canal Co.*, 49 Pa. St. 439; *West Branch Canal Co. v. Mulliner*, 68 Id. 357; *The Railroad Co. v. Duncan*, 111 Id. 352, 361. See *ante*, p. 422.

The argument may be thought to err in assuming the premises on which it depends. The right of eminent domain extends to the taking of property, but goes no farther; and if the flooding or destruction of the adjacent property is not a taking, it cannot be sustained as an exercise of the right. If it is, compensation is due under the express language of the Constitution and the principles of municipal law. The inquiry is therefore narrowed to the single point, — Can the employment of land acquired under the right of eminent domain or by any other means, in a way to be injurious to health or property and which would be a nuisance at common law, be justified on the ground that the use is public and sanctioned by the legislature? The question would admit of but one reply in England, where the courts are bound by an act of Parliament, but should seemingly be answered in the negative under a Constitution which forbids deprivation without due process of law or by virtue of a statute passed to work the wrong.<sup>1</sup>

It would appear also to have been thought in the above instances that incorporating a company for a purpose which involves or necessitates acts that may be attended with injurious consequences for which no remedy can be had under the existing law, implies a stipulation that none shall be afforded subsequently, and precludes the legislature from enacting that persons who are thereafter injured by such acts shall be entitled to compensation in damages. Such a conclusion would seem to be at variance with two well-settled principles, — that no great legislative power shall be abridged or surrendered unless the intention is set forth explicitly; and that the State may, in the exercise of the police power, lay down rules which will incidentally preclude an incorporated company from exercising the powers conferred by the charter, or doing that which it was expressly authorized to perform.<sup>2</sup> I may add that even in England a legislative authority to construct a railway will not exempt

<sup>1</sup> See *ante*, p. 423.

<sup>2</sup> See *The Beer Co. v. Massachusetts*, 97 U. S. 25; *The Fertilizing Co. v. Hyde Park*, Id. 659.

the company from liability for fire communicated by their engines, however carefully made and operated, unless an authority to use locomotives is superadded.<sup>1</sup>

While a charter is confessedly irrevocable as regards all that can legally pass by the grant, there is some difficulty in determining how far the authority of the legislature extends, and whether it can constitutionally part with any power which has been conferred upon it for the general good. All the authorities agree that there are limits beyond which such a grant will be contrary to public policy and void,<sup>2</sup> but there is a difference of opinion as to what cases are within the principle. Thus it was long a question whether a grant or charter exempting an individual or body corporate from taxation, or from taxes of a certain kind, was valid, or might be disregarded by the State. The courts of Ohio, Pennsylvania, and some of the other States maintained that the constitutional guaranty is limited to valid contracts; an invalid contract has no obligation and could not be impaired. A legislature could not bind future legislatures not to exercise the powers intrusted to them by the people, nor could they relinquish any of the essential attributes of sovereignty in favor of a private corporation or an individual.

The power to tax should, in view of its nature, be exercised equally, otherwise it would be confiscation; an agreement to exercise it unequally was nugatory.<sup>3</sup> The right to interpret the national Constitution belonged to the Supreme Court of the United States; but it was for the State courts to say whether a contract was valid under the Constitution and laws of a State. Taxation is a sovereign power held for the benefit of the people, which should be kept inviolate and exercised from time to time as circumstances required. In *Mott v. Pennsylvania R. R. Co.*<sup>4</sup> a law exempting the property of the defendants from taxation in

<sup>1</sup> *Jones v. The Festiniog Railway Co.*, L. R. 3 Q. B. 733; *Vaughan v. The Taff Vale Railway Co.*, 5 H. & N. 675.

<sup>2</sup> *Parker v. The Commonwealth*, 6 Pa. 507; *Philadelphia v. Fox*, 64 Pa. 169.

<sup>3</sup> See *ante*, p. 291.

<sup>4</sup> 33 Pa. 9.

consideration of certain acts to be done on their part, was accordingly declared to be unconstitutional; and in the *Iron City Bank v. City of Pittsburg*,<sup>1</sup> the court declared that they had not changed their opinion, although conceding that it must be abandoned in deference to the decisions of the Supreme Court of the United States. The same view was persistently taken in Ohio,<sup>2</sup> and the decisions in New Hampshire were to the same effect.<sup>3</sup> When, however, these cases came before the tribunal of last resort they were overruled, and it was established that an exemption from taxation is binding, and cannot be repealed by the same or any subsequent legislature.<sup>4</sup> What contracts shall be valid depends, in the absence of constitutional restraints, agreeably to this view, on the will of the people as declared by their representatives; and hence a legislative grant or contract cannot be set aside by the courts on the ground of public policy, nor unless it is contrary to the organic law.<sup>5</sup>

These decisions go very far, but are perhaps essential to the attainment of the end which the Constitution had in view, because the power to tax may be so used as to destroy, and persons who engage in a costly enterprise in reliance on a stipulation that it shall be exempt from taxation, are entitled to require that good faith shall be observed.

Immunity from taxation is a personal privilege which is not transferable by the grantees and will not pass by a sale of their property or franchises unless the intention of the legislature was to enter into a contract with the pur-

<sup>1</sup> 1 Wright, 340.

<sup>2</sup> See *De Bolt v. The Ohio Life Insurance Co.*, 1 Ohio, N. S. 563; *The Sandusky Bank v. Wilbor*, 7 Id. 481; *Skelly v. The Jefferson Bank*, 9 Id. 606.

<sup>3</sup> *Brewster v. Hough*, 10 N. H. 138; *Backus v. Lebanon*, 11 Id. 19.

<sup>4</sup> *Farrington v. Tennessee*, 95 U. S. 679; *Murray v. Charleston*, 96 Id. 432.

<sup>5</sup> See *The Piqua Bank v. Knoop*, 16 Howard, 369; *Dodge v. Woolsey*, 18 Id. 331; *The Jefferson Bank v. Skelly*, 1 Black, 436; *Home of the Friendless v. Rouse*, 8 Wallace, 430; *Washington University v. Rouse*, 8 Id. 439; *Erie R. R. Co. v. Pennsylvania*, 21 Id. 492; *The Northwestern University v. The People*, 99 U. S. 309; *Given v. Wright*, 117 Id. 655.

chasers, or hold the exemption forth as an inducement to them to buy, which will not be presumed unless it is distinctly declared.<sup>1</sup> It is immaterial in this regard whether the transfer is the act of the parties or the act of the law; and a sale of the property of a railway or other incorporated company under a judgment or mortgage, will not pass an exemption from taxation or other franchise of the judgment-debtors or mortgagors, which is not essential to the working and operation of the enterprise or business which the charter was intended to promote.<sup>2</sup> The rule was applied in the case last cited, notwithstanding the contention that a clause in the charter authorizing the company "to borrow money on a mortgage of its charter and works" implied that the mortgagee would succeed, in the event of default, to all the rights and privileges of the original grantees, because doubtful words in a public grant must be interpreted favorably to the State.

The doctrine that a charter confers a contractual right which cannot be violated consistently with the Constitution of the United States, does not necessarily extend to every stipulation which it contains, and the recent course of decision tends to confine it within narrower bounds. It is essential to the obligation of a contract to give or surrender, that the subject-matter should be susceptible of alienation and that there should be power to convey; and if the question were open in this country, it might be contended that these requisites are wanting when the legislature is the grantor, and the thing disposed of a right or privilege which concerns the State and should be exercised for the general good. Such a grant is a law as well as a contract, and therefore subject to modification or repeal; and viewed merely as a contract, relates to matters which are public and cannot

<sup>1</sup> *Wilson v. Gaines*, 103 U. S. 421; *Memphis R. R. Co. v. The Commissioners*, 112 Id. 609; *Chesapeake & Ohio R. R. Co. v. Miller*, 114 Id. 176.

<sup>2</sup> *Morgan v. Louisiana*, 93 U. S. 217; *The Louisville R. R. Co. v. Palmes*, 109 Id. 244; *Memphis R. R. Co. v. The Commissioners*, 112 Id. 609.

be vested absolutely in an individual. The line might perhaps have been drawn between the privileges which could be bestowed by the Crown, and the privileges which could not be conferred without an act of Parliament, and the former viewed as property and irrevocable, conformably to the analogy of the English law. Charters like that of Dartmouth College, and indeed all others, would have been secure under such a rule as regards the inviolability of the corporation, together with everything which it held or acquired that was susceptible of ownership. But while the State might have conferred an exemption from taxation or the right of eminent domain consistently with this view, or provided that there should be but one railroad or slaughter-house in an extensive district, the grant would not have operated as a contract, or been beyond the reach of repeal.

It was notwithstanding held to follow from the Dartmouth College case that the grant of an exclusive right to build a bridge, construct a railway, or supply a city with gas or water, is an integral part of the contract, which the legislature can no more revoke than they can declare that the grantees shall no longer act as a body corporate;<sup>1</sup> and the doctrine was carried to an extreme by holding that the failure of a charter of a railway company to provide compensation for property injured or destroyed by the laying out or construction of the road was equivalent to a stipulation that a remedy should not be given subsequently, and that the omission could not be rectified without a breach of contract which the Constitution forbade.<sup>2</sup> The State was stripped under this interpretation of prerogatives that are commonly regarded as inseparable from sovereignty, and might have stood, like Lear, destitute before her offspring, had not the police power been dexterously declared paramount, and used as a means of rescinding improvident grants.

<sup>1</sup> *New Orleans Gas Co. v. The Louisiana Light Co.*, 115 U. S. 650, 665.

<sup>2</sup> See the *Philadelphia & Trenton R. R. Co.*, 6 Wharton, 35, 44; *Monongahela Navigation Co. v. Coons*, 6 W. & S. 101; *Duncan v. The Railroad*.

In the *New Orleans Gas Co.*,<sup>1</sup> and the *Tammany Water Works v. The New Orleans Water Works*,<sup>2</sup> the Supreme Court of the United States held that an exclusive right to lay pipes in the streets of a city for the purpose of supplying the citizens with gas or water might be irrevocably conferred on a single company. The authorities in some of the States are to the same effect,<sup>3</sup> while the opposite view prevails in others;<sup>4</sup> but the tendency of the recent decisions is to treat such indefeasible privileges, including exemptions from taxation, as exceptions to the rule that the legislature cannot tie its hands or enter into any agreement that will preclude it from acting for the general good. Many powers, and among them the power to coin money and regulate the value thereof, the police power and that of eminent domain, are not only sovereign, but so essential to the care which the State should have for the lives and fortunes of its citizens that they cannot be vested irrevocably in private hands, or exercised save for a public purpose; and any attempt by the State to alienate its authority in these regards will be merely void, and may be so treated by the courts.<sup>5</sup>

The rule is nevertheless subject to qualifications, and varies with the nature of the power and the end in view. A State may forego the power of taxation, but cannot confer it; or, in other words, may covenant not to tax the covenantee, though not that he shall have the right to tax other people. So the powers requisite for municipal and local government may be delegated to a natural or an artificial person appointed by the State or chosen by the inhabitants of the town or district, but cannot be vested irrevocably in the appointee; and a stipulation to that effect will be nugatory. Other powers again, although public in their nature, as concerning the

<sup>1</sup> 115 U. S. 650.

<sup>2</sup> 120 U. S. 64.

<sup>3</sup> *Memphis v. The Water Works*, 5 Heisk. 492; *State v. Milwaukee Gas Light Co.*, 25 Wis. 454.

<sup>4</sup> *Norwich Gas Light Co. v. Norwich Gas Light Co.*, 25 Conn. 19; *The State v. The Cincinnati Gas Co.*, 8 Ohio St. 292.

<sup>5</sup> *The Beer Co. v. Massachusetts*, 97 U. S. 32; *Thorp v. The Railroad Co.*, 37 Vt. 149.

general welfare, may be the subject of statutory grants, which under our system are absolute, and substitute the recipient for the State. Under this head we may include the power to lay out and construct highways, to build bridges, to supply gas, water, and electricity, and numerous privileges that have been liberally bestowed on the great corporations which for good or evil have had so large a share in the development of the United States.

When these powers are exercised through a public agency they remain in the full sense of the term public, and the persons by whom they are administered are public officers;<sup>1</sup> while on the other hand they become private, or are at all events property, when bestowed on individuals or corporators who contribute the funds requisite for the enterprise.<sup>2</sup> The right of eminent domain is in this category; and when an incorporated company is authorized to take land for the construction of a railway or canal, the franchise is irrevocable, and cannot be abrogated without compensating the corporators. But it is not less well settled that incorporating a railway company with the right to take land for the public use, does not place it beyond the reach of the same power which remains unimpaired, and may, notwithstanding a stipulation to the contrary in the charter, be exercised as a means of regaining the franchise which that gave, or appropriating it to a different public use.<sup>3</sup> Accordingly, while the State may agree not to exercise, but cannot confer, the power of taxation, she may confer the power of eminent domain, but cannot enter into any agreement that will preclude its exercise.

The rule that a government cannot be debarred from exercising its authority for the ends for which government is

<sup>1</sup> *East Hartford v. The Hartford Bridge Co.*, 10 Howard, 511.

<sup>2</sup> *The Binghamton Bridge Co.*, 3 Wallace, 51; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 654.

<sup>3</sup> *The Richmond R. R. Co. v. The Louisiana R. R. Co.*, 13 Howard, 71; *The West River Bridge Co. v. Dix*, 6 Id. 507; *McKeen v. The Canal Co.*, 49 Pa. 439, 446; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 673; *ante*, p. 354.

instituted,<sup>1</sup> applies with peculiar force to the police power.<sup>2</sup> This power may be defined as the right and duty of guarding against or forbidding all things that are hurtful to society as an organic whole, or to the individuals of which it is composed; and conversely of authorizing every act which is requisite for carrying such regulations into effect.<sup>3</sup> That such a power exists and may be exercised over individuals, is not seriously questioned, and the recent cases have established that it is not less applicable to bodies corporate.<sup>4</sup>

The incorporation of a company for a specific purpose, — as, for instance, the prosecution of a trade or business, — confers the rights which natural persons have for the same purpose, but confers no more; and the company must submit to any regulation which would be constitutional if made with regard to individuals.<sup>5</sup> No government can by charter or otherwise bargain away its power to provide for the health, safety, and morals of the community. The people themselves have no such authority, and certainly have not delegated it to their representatives.<sup>6</sup>

What is requisite for the general welfare, depends on circumstances which cannot be anticipated, and should be determined in view of the contingency when it occurs; and while

<sup>1</sup> *The Butchers' Union Co. v. Crescent City*, 111 U. S. 746, 752.

<sup>2</sup> *Moore v. The State*, 48 Miss. 147; *The Metropolitan Board v. Baine*, 34 N. Y. 657, 667.

<sup>3</sup> *Thorpe v. Rutland R. R. Co.*, 27 Vt. 150; *Hale v. Lawrence*, 1 Zabriskie, 714; 3 Id. 590; *Lake View v. Rose Hill Cemetery*, 70 Ill. 192; *The State v. Noyes*, 47 Me. 189.

<sup>4</sup> *Boyd v. Alabama*, 94 U. S. 645; *The Beer Co. v. Massachusetts*, 97 Id. 25; *Stone v. Mississippi*, 101 Id. 814; *The Fertilizing Co. v. Hyde Park*, 97 Id. 659; *Butchers' Union Co. v. Crescent City*, 111 Id. 746, 752; *Quackenbush v. Wisconsin R. R. Co.*, 62 Wis. 411; *Black, Constitutional Prohibitions*, sections 61, 62.

<sup>5</sup> *Missouri Pacific R. R. Co. v. Humes*, 115 U. S. 512; *The Railroad Co. v. Maryland*, 21 Wallace, 456; *Chicago R. R. Co. v. Iowa*, 94 U. S. 155; *Ruggles v. Illinois*, 108 Id. 531; *Railroad Commission Cases*, 116 Id. 307, 329.

<sup>6</sup> *The Beer Co. v. Massachusetts*, 97 U. S. 25; *The Butchers' Union Co. v. Crescent City*, 111 Id. 746, 752; *Lake Hill v. Cemetery Co.*, 70 Ill. 191; *Black, Constitutional Prohibitions*, sect. 61.

the legislative discretion must be exercised in subordination to the clause which forbids deprivation without due process of law, it cannot be restricted to narrower bounds. A State cannot repeal a charter because the business for which the company was incorporated proves injurious, or against public policy; but it may prohibit the transaction of such business absolutely, or save under certain conditions, and the company must conform to the general rule. The police power is thus a corrective to the ill consequences which might ensue from the doctrine that statutory grants are contracts and cannot be altered or repealed.<sup>1</sup> Hence when the exercise of a franchise becomes noxious through a change of circumstances, or experience demonstrates that what was once regarded as innocent,—as, for instance, the sale of lottery-tickets, the keeping of gaming-tables, or the retailing of intoxicating liquors,—is prejudicial to health or morals, the legislature may impose such restrictions as they deem requisite, without compensating the grantees or corporators for the loss.<sup>2</sup> A cemetery company may consequently be compelled to make no further interments in a burial-ground within the limits of a city, and to permit the removal of the bodies which are already there, although it was incorporated for the purpose which the statute frustrates.<sup>3</sup> It is not less well established that while the incorporation of a company to carry freight and passengers confers an authority to charge a reasonable sum for the carriage, it simply puts the company in the position of a natural person engaged in the same business; and as he would be subject to legislative control as to the amount of

<sup>1</sup> *Stone v. Mississippi*, 101 U. S. 814; *Butchers' Union Co. v. Crescent City Live Stock Co.*, 111 Id. 746; *Frankford R. R. Co. v. City of Philadelphia*, 58 Pa. 122.

<sup>2</sup> *The Butchers' Union Co. v. Crescent City*, 111 U. S. 746, 752; *The Beer Co. v. Massachusetts*, 97 U. S. 32; *Fertilizing Co. v. Hyde Park*, 107 Id. 667; *Stone v. Mississippi*, 101 Id. 814; *The Western Savings Fund v. The City of Philadelphia*, 31 Pa. 175; *The Presbyterian Church v. New York*, 5 Cowen, 540; *The Commonwealth v. Canal Co.*, 66 Pa. 41, 50; *The Frankford R. R. Co. v. Philadelphia*, 8 Id. 119, 123.

<sup>3</sup> *Presbyterian Church v. New York*, 5 Cowen, 540.

his charges, so will the company be.<sup>1</sup> In like manner, a charter authorizing the construction of a dam across a navigable river as a means of water-power will not preclude the legislature from requiring the company to open a way for the ascent of fish that does not materially interfere with the appropriate use of the dam.<sup>2</sup>

"It might," said Clifford, J., "be doubtful whether the legislature of a State can make a contract with a corporation, authorizing them to construct a dam across a river flowing through two or more States which shall permanently exempt the grantees from all such obligation, and destroy forever the rights of fishery in the river throughout its whole course from its source to its confluence with tide-waters. Concede, however, that the power to make such a contract exists, and that it is as boundless as the theory of the respondents assumes it to be, still the court here is of the opinion that the decree of the State court is correct, and that it should be affirmed, as the charters under which the dam in this case was erected and is maintained do not contain any such exemption from the implied obligation to construct fishways for the free passage of the fish, nor any provision which prohibits the legislature from imposing that obligation under the power reserved to amend, alter, or repeal the charter." This decision would seem preferable to that in *The Commonwealth v. The Pennsylvania Canal Co.*,<sup>3</sup> where it was held that as the dams across the Susquehanna had no fish-ways when they were sold and conveyed by the State, the grantees could not be compelled to open them subsequently, although the effect was to exclude the fish which had formerly ascended the stream in great numbers from the sea.<sup>4</sup>

<sup>1</sup> *Railroad Co. v. Maryland*, 21 Wallace, 456; *Ruggles v. Illinois*, 108 U. S. 526; *Railroad Commission Cases*, 116 Id. 307, 329.

<sup>2</sup> *The Holyoke Co. v. Lyman*, 15 Wallace, 523.

<sup>3</sup> 66 Pa. 41.

<sup>4</sup> The principle is given in the following extract from the judgment in the *Frankford R. R. Co. v. The City of Philadelphia*, 58 Pa. 122: "The argument on behalf of the plaintiffs starts with the assertion that, being a corporation created by the State, they are subject only to such burdens as are clearly imposed by their charter. If by this it is meant

In *The Beer Co. v. Massachusetts*<sup>1</sup> a company was incorporated "for the purpose of manufacturing malt liquors

that they are subject to no other burdens, regulations, or restrictions than those which are expressly enumerated in the act of assembly which authorized their corporate existence, we cannot yield our assent to it. They were incorporated with two privileges: the one was a right to construct a railway upon and along some of the public streets of the city of Philadelphia, and the other was a right to run passenger-cars on the railway when constructed, and to engage in the business of passenger-carriers. Of both these privileges they are undoubtedly purchasers, and they cannot be deprived of them by any action of the city. But the grant of a privilege to carry passengers in cars over the streets does not necessarily involve exemption from liability to municipal regulation. It is not the bestowal of a right superior to the rights enjoyed by passenger-carriers generally, whether such carriers be natural or artificial persons. The facilities for the use of the right may be greater, but the right itself can be neither more nor less than a natural person possesses. If it is to be presumed that when the legislature creates a corporation, and authorizes it to carry on a specified business within the limits of a municipal organization, the business is intended to be conducted under the restrictions, rules, and regulations that govern the same business when transacted by others within the same corporate limits, can it be doubted that a company chartered and endowed with the single privilege of running a line of omnibuses within a city or borough, would take the privilege subject to reasonable municipal regulations of its enjoyment? Would the vehicles of such a corporation be beyond all control of the city or borough as to the rate of speed at which they might be run, or as to the places where they might stop? Might they obstruct crossings whenever and wherever the company might please, and the municipal authorities be powerless to restrain the public inconvenience? Is such an exemption from reasonable local regulation a part of the legislative grant? If it is, the grant is more than conferring a right to do the business. Suppose a company chartered to make and sell bread in the city: is it beyond the power of the local authorities to prescribe the weight of the loaves which they make and sell? Or if authorized to own and use hackney-coaches, may not stands be prescribed for them? These and a multitude of similar questions may be put, to which there can be but one answer. A power or a right in the hands of a corporation can be no greater than the same power or right in the hands of a natural person. Any regulations which may be imposed upon its exercise by one, may be imposed upon its exercise by the other." For like reasons the legislature may compel railway companies to sound a whistle or ring a bell before crossing a public road,

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<sup>1</sup> 97 U. S. 32.

in all their varieties in the city of Boston." A subsequent act prohibited the manufacture of malt liquors for sale in Massachusetts, and brewing and keeping them for sale, on pain of fine and imprisonment and the forfeiture of the liquors to the Commonwealth. The State tribunals held that "the act did not impair the obligation of the contract contained in the charter," and the decision was upheld by the Supreme Court of the United States on the following grounds: "The plaintiff in error was incorporated 'for the purpose of manufacturing malt liquors in all their varieties,' it is true, and the right to manufacture undoubtedly, as the plaintiff's counsel contends, included the incidental right to dispose of the liquors manufactured. But although this right or capacity was thus granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor, nor as exempting the corporation from any control therein to which a citizen would be subject if the interest of the community should require it. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State. We do not mean to say that property actually in existence, and in which the right of the owner has become vested, may be taken for the public good without due compensation; but we infer that the liquor in this case, as in the case of *Bartemeyer v. Iowa*,<sup>1</sup>

and to erect fences on either side of their tracks, and render them liable in double the amount of damages occasioned by a failure to comply. *Missouri Pacific R. R. Co. v. Humes*, 115 U. S. 572; *Thorpe v. The Railroad Co.*, 27 Id. 140; *Ohio R. R. Co. v. McClelland*, 25 Ill. 140; *Galena R. R. Co. v. Loomis*, 13 Id. 548; and the power extends to regulating the fares and charges for freight and passengers, and prescribing the points at which stations shall be erected and maintained. *Ruggles v. Illinois*, 108 U. S. 536; *New Haven R. R. Co. v. Hammersly*, 104 Id. 1; *Railroad Commissioners v. Portland R. R. Co.*, 63 Me. 269; *Pittsburg R. R. Co. v. Southeast R. R. Co.*, 77 Pa. 173.

<sup>1</sup> 18 Wallace, 129.

was not in existence when the liquor law of Massachusetts was passed. Had the plaintiff in error relied on the existence of the property prior to the law, it behooved it to show that fact. But no such fact is shown, and no such point is taken. The plaintiff in error boldly takes the ground that, being a corporation, it has a right, by contract, to manufacture and sell beer forever, notwithstanding and in spite of any exigencies which may occur in the morals or the health of the community requiring such manufacture to cease. We do not so understand the rights of the plaintiff. The legislature had no power to confer any such right. Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot by any contract divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex*, and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself.<sup>1</sup> Since we have already held, in the case of *Bartemeyer v. Iowa*,<sup>2</sup> that as a measure of police regulation, looking to the preservation of public morals, a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States, we see nothing in the present case that can afford any sufficient ground for disturbing the decision of the Supreme Court of Massachusetts."

In the *Fertilizing Company v. Hyde Park*<sup>3</sup> the State of Illinois granted a charter authorizing the conversion of animal matter into manure for fifty years, at any point south of a certain line in Cook County; and the company selected a locality, subsequently known as Hyde Park, and laid out

<sup>1</sup> *Boyd v. Alabama*, 94 U. S. 645.

<sup>3</sup> 107 U. S. 667.

<sup>2</sup> 18 Wallace, 129.

large sums of money in the erection of the buildings and machinery requisite for the business for which they had been incorporated. Hyde Park was then a morass, but became a populous town ; and the inhabitants were annoyed and their health endangered by the exhalations from the company's works, and it was held that the legislature might authorize the town to forbid the transportation of dead animals through the streets, and thus in effect compel the company to refrain from exercising the privilege conferred by the charter, or remove elsewhere. The court said in giving judgment: "That a nuisance of a flagrant character existed, as found by the court below, is not controverted. We cannot doubt that the police power of the State was applicable, and adequate to give an effectual remedy. That power belonged to the States when the Federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases. It rests upon the fundamental principle that every one shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary functions."

Strong, J., dissented on the ground that what is and what is not a nuisance depends largely on the will of the legislature, which can "legalize acts that would otherwise be obnoxious to the criminal law." The defendant's works were no doubt offensive to the senses, and had become more or less injurious through the growth of the town in which they were erected. This was an inconvenience ; but the accumulation of offal and refuse matter in the streets of Chicago would have been still more inconvenient. It was for the supreme authority of the State to say which was the greater evil, and that had answered the question by granting a charter to the Fertilizing Co., on the faith of which they had expended \$250,000, and which must be regarded as an implied contract that the privilege which it conferred should not be impaired by the exercise of the police power or in any other way.

In *Coates v. The Mayor of New York*<sup>1</sup> an ordinance was adopted by the City Councils on the 7th October, 1823, under an authority conferred by the legislature, March 9, 1813, forbidding interments or the depositing of dead bodies in vaults in the city south of a designated line. A penalty was prescribed for its violation. The action was brought to recover the penalty for depositing a dead body in a vault in Trinity Churchyard. A plea was interposed, setting forth that the *locus in quo* was granted by the King of Great Britain, on the 6th of May, 1697, to a corporation by the name of the "Rector and Inhabitants of the city of New York in Communion with the Protestant Episcopal Church of England" and their successors forever, as and for a churchyard and burying-place, with the rights, fees, etc.; that immediately afterwards the land was appropriated and thenceforward used as and for a cemetery for the interment of dead bodies; that the rector and wardens of Trinity Church were the same corporation; and that the body in question was deposited in the vault in the churchyard by the license of that corporation. A general demurrer was filed, and the case elaborately argued. The validity of the ordinance was sustained. The court held that the act under which it was passed was not unconstitutional, either as impairing the obligation of contracts or taking property for public use without compensation, but stood on the police power to make regulations in respect to nuisances. "Every right, from absolute ownership in property down to a mere easement, is purchased and holden subject to the restriction that it shall be so exercised as not to injure others. Though at the time it be remote and inoffensive, the purchaser is bound to know at his peril that it may become otherwise by the residence of many people in its vicinity, and that it must yield to by-laws and other regular remedies for the suppression of nuisances. In such cases prescription, whatever the length of time, has no application. Every day's continuance is a new offence, and it is no justification that the party complaining came voluntarily within its reach. Pure air and the comfortable enjoyment of

<sup>1</sup> 7 Cowen, 585.

property are as much rights belonging to it as the right of possession and occupancy. If population, where there was none before, approaches a nuisance, it is the duty of those liable at once to put an end to it.”<sup>1</sup>

It is at the same time clear that a State cannot, by arbitrarily assuming that a trade or commodity is injurious to the common weal, justify the breach of a contract or impair the rights of a corporation or an individual. The police power is, like all others, subject to the Constitution, and cannot be used as a color for the disregard of the restrictions which that imposes.<sup>2</sup> Convenience, utility, or profit will not alone sustain such a plea, nor can it rest on the recitals of a statute where there is no substantial basis.<sup>3</sup> The question is primarily for the legislature, and their decision should not be lightly disregarded by the courts; but it will still be for the judiciary to decide in the last resort whether the right or privilege which it is sought to abrogate has such a relation to health, order, or morals that it can legitimately be divested on that ground.<sup>4</sup> It followed in the case last cited that the exclusive privilege which had been granted to the Louisiana Light Co. of laying pipes or conduits in the streets of New Orleans for supplying that city with gas could not be revoked without impairing the obligation of the contract. It was not a monopoly, because as no one could use the public highways for such a purpose without an authority from the government, so no one lost or was deprived of anything by the grant to the company. Such was the decision in *New Orleans v. Clark*,<sup>5</sup> and the court adhered to that view. Nor

<sup>1</sup> See *The Brick Presbyterian Church v. The Mayor of New York*, 5 Cowen, 538, 542; *The Fertilizing Co. v. Hyde Park*, 107 U. S. 667.

<sup>2</sup> *Chy Lung v. Freeman*, 92 U.S. 275; *The Railroad Co. v. Husen*, 95 Id. 465.

<sup>3</sup> *In re Jacobs*, 98 N. Y. 98, 110; *The People v. The Jackson Plank Road Co.*, 9 Mich. 307; *Cooley, Const. Limitations*, 577.

<sup>4</sup> *In re Jacobs*, 98 N. Y. 98, 109; *The People v. Marx*, 99 Id. 377; *Coe v. Schultz*, 47 Barb. 64; *The New Orleans Gas Co. v. The Louisiana Light Co.*, 115 U. S. 650.

<sup>5</sup> 95 U. S. 644. See *St. Tammany Water Works v. New Orleans Water Works*, 120 Id. 64, to the same effect.

could it justly be said that the privilege endangered the public health or the public safety. The object was, on the contrary, beneficial, — to do that at the risk and with the funds of the corporation which the State could not do herself; and if the company abused their powers, they might be controlled by legislation, or the franchise might be rescinded by the aid of the power of eminent domain. The point was again decided in another case in the same volume of reports;<sup>1</sup> and in *The New Orleans Water Works Co. v. Rivers*<sup>2</sup> the principle was applied to an exclusive right to furnish a supply of water. In like manner, a company may be endowed with the exclusive right to erect and maintain a slaughter-house, market, or other structure devoted to a specific use, wherever the circumstances are such that the government might, for the preservation of health and order, take the matter into its own hands, and may therefore delegate it to the persons whom it deems best fitted for such a service.<sup>3</sup>

When, however, as in such instances, the validity of a monopoly depends on the assumption that the subject-matter lies within the police power, and might be withheld from every one on that ground, the privilege may be abrogated by virtue of the same power, and the courts will not set aside the act unless it is manifestly arbitrary and oppressive.<sup>4</sup>

The cases which establish that the police power is insusceptible of alienation might seem to be at variance with the decisions that the power of taxation may be made the subject of a contract which will preclude its exercise; but both views were ingeniously shown to be reconcilable in *Stone v. Mississippi*.<sup>5</sup> “We have held,” said Waite, C.-J., “not, however, without strong opposition at times, that

<sup>1</sup> *The Louisville Gas Co. v. The Citizens' Gas Co.*, 115 U. S. 683.

<sup>2</sup> 115 U. S. 674.

<sup>3</sup> *Slaughter-House Cases*, 16 Wallace, 36; *Le Claire v. Davenport*, 13 Iowa, 210; *Chicago v. Rumpff*, 45 Ill. 90; *Tiedeman, Limitations of Police Powers*, 3, 24.

<sup>4</sup> See *Slaughter-House Cases*, 16 Wallace, 36; *The Butchers' Union Co. v. Crescent City*, 111 U. S. 746.

<sup>5</sup> 101 U. S. 814, 819.

this clause protected a corporation in its charter-exemptions from taxation. While taxation is in general necessary for the support of the government, it is not part of the government itself. Government was not organized for the purpose of taxation, but taxation may be necessary for the purposes of government. As such, taxation becomes an incident to the exercise of the legitimate functions of government, but nothing more. No government dependent on taxation for support can bargain away its whole power of taxation, for that would be substantially abdication. All that has been determined thus far is, that for a consideration it may, in the exercise of a reasonable discretion and for the public good, surrender a part of its powers in this particular. But the power of governing is a trust committed by the people to the government, no part of which can be granted away. The people in their sovereign capacity have established their agencies for the preservation of the public health and the public morals and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority while in power, but they cannot give away nor sell the discretion of those that are to come after them in respect to matters the government of which, from the very nature of things, must 'vary with varying circumstances.' They may create corporations, and give them, so to speak, a limited citizenship; but as citizens limited in their privileges or otherwise, these creatures of the government creation are subject to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality. The contracts which the Constitution protects are those that relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental from property rights a particular case is to be put; but in respect to lotteries there can be no difficulty. They are not, in the legal acceptance of the term, *mala in se*, but, as we have just seen, may properly be made *mala prohibita*. They are a species of gambling, and wrong in their influences. They disturb the checks and

balances of a well-ordered community. Society built on such a foundation would almost of necessity bring forth a population of speculators and gamblers, living on the expectation of what, 'by the casting of lots, or by lot, chance, or otherwise,' might be 'awarded' to them from the accumulations of others. Certainly the right to suppress them is governmental, to be exercised at all times by those in power at their discretion. Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has in legal effect nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the State. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal."

Whatever the rule may be as regards taxation, the power to provide for the administration of justice is not merely governmental, but one which should be untrammelled, in view of the end for which it is conferred; and a citizen who obtains a statutory grant which is at variance with this principle must be presumed to know that it is invalid, and may be set aside.<sup>1</sup>

In this instance the question arose under an act providing that on the erection of a court-house and public offices by the inhabitants of the town of Canfield, the county seat should be permanently established in that locality. These conditions were complied with; but the legislature passed another statute, which virtually repealed the first, and fixed the meeting of the court in a neighboring town. Certain property-holders and residents of Canfield then filed a bill averring that the former act was a contract which the latter impaired, and praying that the contemplated removal might

<sup>1</sup> *Newton v. The Commissioners*, 100 U. S. 548.

be enjoined. The court held that there was no contract, but merely a declaration of a legislative will or purpose, which might be changed, and that if the statute and the acts done under it constituted a contract, still the parties and the subject-matter were such that one legislature could not bind another, or preclude it from placing the seat of justice wherever the public convenience required. Swayne, J., cited and relied on the previous decisions as conclusive of both the points involved. Agreeably to the case of *East Hartford v. The Hartford Bridge Co.*,<sup>1</sup> where the question arose out of the grant to a municipal corporation of a right of ferriage and to levy tolls, the relation of the parties did not admit of their entering into a compact that could not be modified by subsequent legislation. The legislature was acting on the one part, and a municipal corporation on the other, with a view to a public object, which was virtually a highway over another highway up and down the river. It followed that the enactments which established the ferry must be considered rather as a public law than as contracts. They related to public interests. They changed as those interests demanded. The grantees likewise, being mere organizations for public purposes, were liable to have their public powers, rights, and duties modified or abolished at any moment by the legislature. It was hardly possible to conceive the grounds on which a different result could be vindicated, without destroying all legislative sovereignty and checking most legislative improvements and amendments, as well as supervision over its subordinate public bodies. The legislative power of a State, except so far as restrained by its own Constitution, was at all times absolute with respect to all offices within its reach. It might at pleasure create or abolish them, or modify their duties; it might also shorten or lengthen the term of service; and it might increase or diminish the salary or change the mode of compensation.<sup>2</sup> The police power of the States, and that with respect to municipal corporations, and to many other things which might be named,

<sup>1</sup> 10 Howard, 511.

<sup>2</sup> *Butler v. Pennsylvania*, 10 Howard, 402.

were of the same absolute character.<sup>1</sup> "In all these cases there can be no contract and no irrevocable law, because they are 'governmental,' and hence within the category above stated. They involve public interests, and legislative acts concerning them are necessarily public laws. Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil. All these considerations apply with full force to the times and places of holding courts. They are both purely public things, and the laws concerning them must necessarily be of the same character. If one may be bargained about, so may the other."

It was held in like manner in the *Railroad Co. v. Hecht*<sup>2</sup> that the legislature did not, by prescribing a mode of serving process upon railroad companies differing from that provided for in the charter, impair the obligation of the contract between such company and the State, because the power of a State to regulate the methods of administering justice is incident to government, and an intention to surrender it cannot be presumed, and will be ineffectual if expressed.

The right to take private property for public use is inherent in sovereignty, and so needful for its exercise that it may be delegated, but cannot be surrendered. A company may be authorized to construct a bridge or railway and occupy the ground requisite for that end, and such a grant is, as we have seen, a contract which cannot be rescinded consistently with the Constitution of the United States; but the right of

<sup>1</sup> Cooley, Const. Lim., 232, 342; *The Regents v. Williams*, 9 Gill & J. (Md.) 365, 391.

<sup>2</sup> 95 U. S. 168.

eminent domain remains in the State, which may resume what it has bestowed, or transfer it to another company incorporated for an analogous purpose, and thus in effect abrogate the right of the original grantees.<sup>1</sup> Such is the rule with regard to public grants of land and chattels, and it applies to franchises, which would confessedly be revocable did they not partake of the nature of property and fall within the scope of the right of eminent domain. A franchise is as inviolable as property in any other form, but it has no higher claim; and although a State cannot take back what it has given, it may compel an owner to sell what is requisite to supply a public need, whether his title originated in a legislative or in a private grant.<sup>2</sup> Such is confessedly the rule when the charter is silent; and there can be little doubt that a stipulation that the right shall not be exercised is invalid. Were such a provision legal, it would arise by implication, because giving implies an undertaking not to resume. The case of the Binghampton Bridge might seem to contravene this view; but the legislature there intervened arbitrarily, without indemnifying the prior grantee.

Although the legislature cannot ordinarily take the property of A and bestow it on B by virtue of the right of eminent domain, it may do so when the object is a public use and not merely to benefit the grantee. A turnpike may consequently be superseded by a railway on due compensation made to the injured parties, or the owner of a ferry be deprived of his tolls through the erection of a bridge, or one railway company authorized to cross the track of another, or even — though this would be an extreme case — to occupy a part or the whole of its line.<sup>3</sup> A different rule might render a charter, granted

<sup>1</sup> *The Piscataqua Bridge Co. v. New Hampshire Bridge*, 7 N. H. 35; *The Boston R. R. Co. v. The S. & L. R. R. Co.*, 2 Gray, 1; *The Proprietors v. Lowell*, 7 Id. 223; *The Richmond R. R. Co. v. The Louisiana R. R. Co.*, 13 Howard, 71; see *ante*, p. 354.

<sup>2</sup> *The West River Bridge Co. v. Dix*, 6 Howard, 507; *Greenwood v. The Freight Co.*, 105 U. S. 13, 22; *Richmond R. R. Co. v. The Louisiana R. R. Co.*, 13 Howard, 71; *The Central Bridge Co. v. The City of Lowell*, 4 Gray, 474.

<sup>3</sup> *New Orleans Gas Co. v. The Louisiana Light Co.*, 115 U. S. 650, 673;

with a view to promote improvement, a barrier which no subsequent legislation could overcome for any end however needful, and confine the public to the use of antiquated methods and inventions.<sup>1</sup>

The presumption is nevertheless against an intent to annul what the legislature has previously done or granted, and an authority to appropriate property which has already been taken by virtue of the right of eminent domain will not be presumed unless it is conferred in terms or results by a necessary implication, as when a company is authorized to construct a railway from one point to another, and must therefore necessarily pass over the bed of another railway which crosses its path.<sup>2</sup>

The power to appropriate rights *ex contractu* to public use is doubtful, and seemingly does not exist where the government is the debtor or obligor. It would be of dangerous consequence if a State could adopt a course calculated to depreciate its loans or bonds, and then compel the creditors to part with them at the market rate or that fixed by a jury. This remark does not apply to charters or other exe-

The West River Bridge Co. *v.* Dix, 6 Howard, 507, 534; The Richmond R. R. Co. *v.* The Louisiana R. R. Co., 13 Howard, 71, 83; The Boston Water Power Co. *v.* B. & N. R. R. Co., 23 Pickering, 360; Boston & Lowell R. R. Co. *v.* Salem R. R. Co., 2 Gray, 35; Charles River Bridge *v.* The Warren Bridge, 7 Pickering, 394; 11 Id. 420; Greenwood *v.* The Freight Co., 105 U. S. 13, 22; The Enfield Toll Bridge *v.* The Hartford R. R. Co., 17 Conn. 45.

<sup>1</sup> See The West River Bridge Co. *v.* Dix, 6 Howard, 507, 547.

<sup>2</sup> In the matter of the Petition of the New York L. & W. R. R. Co., 99 N. Y. 23; In the matter of the B. & A. R. R. Co., 53 N. Y. 574; In the matter of the Rochester Water Co., 66 Id. 413; P. P. & C. I. R. R. Co. *v.* Williamson, 91 Id. 552. It was said in The Boston Water Power Co. *v.* The Railroad Co., 23 Pick. 360, 368, that the legislature cannot, by virtue of this power, authorize a new turnpike, canal, or railroad on the same line which has been granted to another and coincident with it to its full extent, because the effect would be to provide the same easement which had already been provided for, and there would be no public end in view; but in New Orleans *v.* The Southern Telegraph Co., 53 Ala. 217, the establishment of one telegraph line along the route which had previously been exclusively granted to another, was held to be a constitutional exercise of the right of eminent domain, *ante*, p. 354.

cuted contracts, which confer rights or franchises having a pecuniary value that can be definitely ascertained and paid for.<sup>1</sup>

<sup>1</sup> See *The West River Bridge Co. v. Dix*, 6 Howard, 507, 558, when the court held the following language:—

“A distinction has been attempted in argument between the power of a government to appropriate for public uses property which is corporeal, or may be said to be in being, and the like power in the government to resume or extinguish a franchise. The distinction thus attempted we regard as a refinement which has no foundation in reason, and one that in truth avoids the true legal or constitutional question in these causes; namely, that of the right in private property to control and actually to prohibit the power and duty of the government to advance and protect the general good. We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property. A franchise is property, and nothing more; it is incorporeal property, and is so defined by Justice Blackstone when treating, in his second volume, chap. iii. p. 20, of the Rights of Things. It is its character of property only which imparts to it value, and alone authorizes in individuals a right of action for invasions or disturbances of its enjoyment. Vide *Bl. Comm.*, vol. iii. chap. xvi. p. 236, as to injuries to this description of private property, and the remedies given for redressing them. A franchise, therefore, to erect a bridge, to construct a road, to keep a ferry, and to collect tolls upon them, granted by the authority of the State, we regard as occupying the same position, with respect to the paramount power and duty of the State to promote and protect the public good, as does the right of the citizen to the possession and enjoyment of his land under his patent or contract with the State; and it can no more interpose any obstruction in the way of their just exertion. Such exertion we hold to be not within the inhibition of the Constitution, and no violation of a contract. The power of a State, in the exercise of eminent domain, to extinguish immediately a franchise it had granted, appears never to have been directly brought here for adjudication, and consequently has not been heretofore formally propounded from this court; but in England this power to the fullest extent was recognized in the case of *The Governor & Company of the Cast Plate Manufacturers v. Meredith*, 4 Term Reports, 794, and *Lord Kenyon*, especially in that case, founded solely upon this power the entire policy and authority of all the road and canal laws of the kingdom.”

## LECTURE XXVIII.

Public Corporations Agencies which may be revoked or modified. — Their Contracts are obligatory, and cannot be varied or annulled legislatively. — The Right and Duty of a Municipal Corporation to levy Taxes for the Payment of its Creditors may be enforced by Mandamus so long as the Corporation is in being, notwithstanding a Law to the contrary. — They cease when it is dissolved, but may revive on the Grant of a New Charter. — On the Dissolution of a Corporation, its Private Property is charged with a Trust for Creditors, its Public Property is exempt from Execution, and reverts to the State. — Public Offices Agencies not Contracts, and may be abolished during the Term, or the Salary lessened. — A State may engage a Public Servant for a Definite Period, and will then be bound.

THE authorities which have been cited denote that the legislature cannot part irrevocably with the powers which have been intrusted to it for the public welfare, or create a subordinate government which will be beyond its control.<sup>1</sup> Public corporations, therefore, as the Chief-Justice pointed out in the Dartmouth College case, are agencies established for governmental purposes, and may be modified or revoked at pleasure. There is no contract in the ordinary sense of the term, or within the meaning of the Constitution of the United States; and if there were, it would fail when on the repeal of the charter one of the parties to the instrument ceases to exist. This is true of all public corporations, and applies with full force to the charters which confer the right of local self-government on towns and boroughs.<sup>2</sup> One distinc-

<sup>1</sup> See *ante*, pp. 608, 620.

<sup>2</sup> *Sharpless v. Philadelphia*, 21 Pa. 147; *Kirby v. Shaw*, 7 Id. 258; *The City of Erie v. The Erie Canal Co.*, 59 Pa. 174; *Moers v. Reading*, 21 Pa. 188; *Paterson v. The Society*, 24 N. J. Law, 385; *Berlin v. Gorham*, 34 N. H. 266; *Butler v. Pennsylvania*, 10 Howard, 402; *Newton v. The Commissioners*, 100 U. S. 528, 548; *Meriwether v. Garrett*, 102 Id. 472.

tive feature of such an agency is that the legislature creates the body which it employs and authorizes, another that the corporation contracts in its own name, and not on the credit of the citizens individually, or of the State. Hence when it is dissolved, the entire fabric crumbles, and if another is substituted, it will not necessarily inherit the obligations of its predecessor.<sup>1</sup>

A municipal corporation may be viewed in different aspects, — that which it has to the citizen, and that which it bears to the State.<sup>2</sup> Seen in the latter relation, it is a revocable agency, constituted for the purpose of carrying out in detail such objects of the government as may be properly intrusted to a subordinate, having no vested right to any of its forms or franchises, and entirely under the control of the legislature, which may enlarge or circumscribe its territorial limits or functions, may change or modify its various departments, or extinguish it with the breath of arbitrary power.

While such is the relation of a municipal corporation to the State, in all other respects it enjoys the rights and is subject to the liabilities of a private corporation or of an individual. For this end it is constituted as a body politic and corporate, having a local habitation and a name, a seal by which to authenticate its acts, a capacity to contract, to sue and to be sued, and to hold and dispose of property with the attendant rights and responsibilities.

“It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates and to the business which is to be transacted. Thus many States of this Union which have an interest in banks are not suable even in their own courts; yet they never exempt the corporation from being sued. The State

<sup>1</sup> *Meriwether v. Garrett*, 102 U. S. 472.

<sup>2</sup> *Mobile v. Watson*, 116 U. S. 289, 304.

of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily stripped itself of its sovereign character so far as respects the transactions of the bank, and waived all the privileges of that character. As a member of that corporation a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation than are expressly given by the incorporating act.”<sup>1</sup> For like reasons, municipal corporations, though creatures and instrumentalities of the State, are subject to the jurisdiction of the courts and may be made answerable in damages for their torts and breaches of contract, or when the exigency of the case requires, restrained by injunction.<sup>2</sup>

It follows that the contracts of a city or borough cannot be varied or annulled to the detriment of the persons entitled under them as creditors. So far as such corporations are endowed with subordinate powers for local government, they are the mere instruments of the State for the convenient administration of its affairs, and are subject to legislative control. When, however, they are empowered to borrow money, to issue bonds in aid of a railway company, or to contract for any other legitimate purpose, and proceed in pursuance of the authority so conferred, they are as much bound, and their obligations are attended with the same guaranties, as those of private corporations or of individuals.<sup>3</sup> But while the obligations of public corporations are thus theoretically indefeasible, they cannot be enforced against their public property, and may be rendered fruitless by repealing the charter, and with it the power of taxation which is the main reliance of the creditors.<sup>4</sup>

<sup>1</sup> *The United States Bank v. Planters' Bank*, 9 Wheaton, 907.

<sup>2</sup> See *Brady v. Weeks*, 3 Barb. (N. Y.) 157; *Baily v. The City of New York*, 3 Hill, 571; *The Western Savings Fund v. The City of Philadelphia*, 31 Pa. 175.

<sup>3</sup> *Wolff v. New Orleans*, 103 U. S. 103; *Von Hoffman v. The City of Quincy*, 4 Wallace, 554; *Williams's Appeal*, 72 Pa. 214; *The People v. Otis*, 90 N. Y. 48; *McCracken v. Moody*, 33 Ark. 87; *Smith v. Appleton*, 19 Wis. 488; *The State v. Young*, 29 Minn. 474.

<sup>4</sup> *Meriwether v. Garrett*, 102 U. S. 472.

There is another point of view ; because while such a corporation is simply an agency relatively to the State, and stands on the same level with the citizen as regards liability for torts and breaches of contract, it is still endowed with some of the powers incident to sovereignty, and may levy taxes, take private property for public use, make ordinances, and enforce them by appropriate penalties. It is this twofold character which renders a municipal corporation a serviceable instrument, which may be shaped to suit the purposes of the legislature, and cast aside if it proves inconvenient. If, for instance, it is thought desirable to build a bridge across a river which bounds or divides a city, or to erect a town-hall, and the city councils decline to take the necessary steps from motives of economy, or because they deem the measure unadvisable, the legislature may appoint commissioners to carry it into effect, with power to contract on behalf of the city, which may thus be charged with the cost of a structure built without its consent, and compelled to raise the requisite amount by taxation, although its finances are already overburdened, and successive grand-juries have declared that the insane poor, and prisoners awaiting trial or convicted, are suffering for the want of accommodation which cannot be provided for want of means. Such a spectacle is presented in Philadelphia, where for nearly twenty years all the money that could be spared from immediate and pressing needs has been compulsorily expended on an enormous pile which surpasses the town-halls and cathedrals of the Middle Ages in extent, if not in grandeur.<sup>1</sup> The step, once taken, is irretrievable, because the commissioners may forthwith make contracts which bind the city, and cannot be set aside consistently with the Federal Constitution by revoking their authority legislatively, or through a convention called to amend the State Constitution.

In the City of Philadelphia *v.* Field,<sup>2</sup> a statute appointing commissioners to build a free bridge across the Schuylkill

<sup>1</sup> *Baird v. Rice*, 63 Pa. 489; *Perkins v. Slack*, 86 Pa. 283; *Struthers v. Philadelphia*, 4 Weekly Notes, 379.

<sup>2</sup> 58 Pa. 320.

with money borrowed for that purpose, and requiring the city of Philadelphia to provide the means of paying the principal and interest, was held to be valid as simply substituting one public agency for another, with a view to the attainment of an end which was within the constitutional authority of the legislature.

It has been said that if the legislature were unfettered like Parliament, distrust would lead to the election of worthier or more capable representatives; but what experience proved was not that there were too many constitutional restraints but too few, and the recurring abuse of legislative discretion led to a series of ingenious and well-considered efforts to devise new and stringent guaranties against corrupt and mistaken legislation,<sup>1</sup> which, nevertheless, not infrequently met with an insuperable obstacle in the clause which shields contracts from retroactive legislation, whether they do or do not operate beneficially to the parties and the community at large.<sup>2</sup>

In *Perkins v. Slack*,<sup>3</sup> the act of Aug. 5, 1870, constituted certain citizens commissioners for the erection of public buildings in the city of Philadelphia; and after authorizing them to make all needful contracts, enacted "that the said commissioners shall make requisition upon the councils of the city, prior to the first day in December in each year, for the amount of money required by them for the purposes of the commission for the succeeding year; and said councils shall levy a special tax sufficient to raise the amount so required." Sect. 2, Art. XV., of the new Constitution, which went into operation in January, 1874, declared, "No debt shall be contracted, or any liability incurred, by any municipal commission except in pursuance of an appropriation previously made therefor by the municipal government."

In November, 1876, the commissioners made a requisition for \$1,500,000 for 1877, which the city councils refused to

<sup>1</sup> See *Perkins v. Slack*, 86 Pa. 270; *Struthers v. Philadelphia*, 4 Weekly Notes, 379.

<sup>2</sup> *The Pennsylvania R. R. Co. v. Duncan*, 111 Pa. 352.

<sup>3</sup> 86 Pa. 270.

raise, and the commissioners then applied for a mandamus to compel them to levy a tax for that amount. The Supreme Court held, that while Sect. 2, Art. XV., of the new Constitution prevented the commissioners after 1874 from making any contract until an appropriation therefor had previously been made, councils might nevertheless be compelled by mandamus to make an appropriation, in order to enable the commissioners to contract. Paxson, J., dissented, on the ground that "irresponsible commissions, imposed upon the city by the legislature, and yet clothed with absolute control over the city purse in the prosecution of their work, are repugnant to our whole theory of government. . . . It was known to the convention that the public buildings at Broad and Market Streets had been projected upon a scale of magnificence better suited for the capitol of an empire than the municipal buildings of a debt-burdened city, and that the time might arrive when their further prosecution would become an oppression upon the tax-payers too grievous to be borne, unless the councils — the immediate representatives of the people — had a control over the amount to be annually expended. These things were well known to the convention, and the clause in controversy should be so construed as to carry out its manifest intent, which was to give the councils, who were answerable for the financial condition of the city as a whole, the control of taxation and expenditure that had been arbitrarily taken from them by the legislature."

A city may obviously be reduced by such means or its own extravagance to a condition in which it can no longer obtain the funds for fulfilling its obligations by taxation, and the legislature may then cut the knot by repealing the charter, taking the public property of the city into its own keeping, and establishing a new city government with such limited powers that it is unable, even if it desires, to pay the debts of the municipality which it has superseded.<sup>1</sup> If, as the better opinion would seem to be, the obligations of the extinct corporation devolve on the State, it does not help the creditors, because a sovereign cannot be sued in his

<sup>1</sup> *Meriwether v. Garrett*, 102 U. S. 472.

own courts without his consent, and the federal tribunals are precluded by the Eleventh Amendment from taking cognizance of actions against a State.

The greater includes the less ; and as a municipal corporation may be dissolved, so it may be deprived of one or more of its franchises, and the rest allowed to stand.<sup>1</sup> In *East Hartford v. The Hartford Bridge Co.*,<sup>2</sup> a legislative grant of a ferry to a municipal corporation was accordingly held to be revocable under the general rule that a right conferred on an agent with a view to the performance of his duties, must be exercised in conformity to the will of the principal, and may be recalled at pleasure. There was no contract between the State and the town of East Hartford that could confer a permanent right to the ferry. The nature of the subject-matter and the character of the parties both forbade such an inference. A legislative body cannot so far part with or delegate its powers as to preclude the resumption of them or their exercise whenever the public interest requires. It is an agent or trustee for the people, and has no right or power to place the trust irrevocably in other hands than its own.<sup>3</sup> Chief-Justice Marshall, in the *Dartmouth College* case,<sup>4</sup> showed that public corporations are subject to the law of the land, and may be controlled or their charters altered or amended in such manner as the public interest requires. In *Layton v. The City of New Orleans*<sup>5</sup> the charter of a municipal corporation was declared to be not a contract, but a mandate, which might be modified by the legislature.

It was declared in like manner in *Philadelphia v. Fox*<sup>6</sup> that the sovereign may continue the existence of a city or borough

<sup>1</sup> *Philadelphia v. Fox*, 64 Pa. 180; *Butler v. Pennsylvania*, 10 Howard, 402; *Meriwether v. Garrett*, 102 U. S. 472; *Norton v. The Commissioners*, 100 Id. 558.

<sup>2</sup> 10 Howard, 511.

<sup>3</sup> *Clark v. The Corporation of Washington*, 12 Wheaton, 54; *The Presbyterian Church v. New York*, 5 Cowen, 542; *Philadelphia v. Fox*, 64 Pa. 169, 181; *Parker v. The Commonwealth*, 6 Barr, 507.

<sup>4</sup> 6 Wheaton, 461.

<sup>5</sup> 12 La. Ann. 515.

<sup>6</sup> 64 Pa. 169.

as a body corporate, and yet assume the appointment of all its officers or agents, because the power which creates and can dissolve, may also modify. The legislature of Pennsylvania could not constitutionally invest any municipal corporation with an irrevocable franchise of government over any part of its territory. It could not alienate any part of the legislative power which the Constitution vested in a general assembly annually convened.<sup>1</sup> Were the legislature to provide, in erecting a municipality, that its charter should be unalterable, the clause would be simply null, "for acts of parliament derogating from the acts of subsequent parliaments do not bind."<sup>2</sup>

In *Philadelphia v. Fox* the question was whether the legislature could confer the control and management of the property which had been bequeathed by Stephen Girard to the city of Philadelphia, and the administration of the charities created by his will, to a Board entitled "The Directors of the City Trusts," who were to be appointed by the courts. Such a substitution would confessedly have been invalid had the bequest been to a private corporation; but it was held that inasmuch as the devisee was a municipal corporation created by the government, it had no legal or constitutional right to the possession or control of the fund, which might be taken out of its hands and confided to any one whom the legislature thought fit to designate.

It has been said to follow from the same premises that municipal corporations are not entitled to the constitutional guaranties which protect private corporations and the community at large, and commissioners may consequently be appointed to determine what proportion of a debt contracted by several boroughs shall devolve on each.<sup>3</sup> This decision goes very far, because the borough may be compelled by a mandamus to levy the sum requisite for the payment of the debt, and the citizen is manifestly interested in a decree which will subject his property to a burden that may render it less valuable.

<sup>1</sup> *Parker v. The Commonwealth*, 6 Pa. 507.

<sup>2</sup> 1 Bl. Com. 90.

<sup>3</sup> *Dunmore's App.*, 52 Pa. 374.

It is now established, contrary to the doctrine of the earlier law, that on the dissolution of a corporation so much of its assets as are not public become subject to a charge for the benefit of its creditors, which may be enforced by a court of equity, on the principle that a trust shall not be allowed to fail for the want of a trustee. The rule is clearly stated as regards private corporations in the following extract from the judgment in *Broughton v. Pensacola*:<sup>1</sup> "The ancient doctrine that upon the repeal of a private corporation, its debts were extinguished and its real property reverted to its grantors, and its personal property vested in the State, has been so far modified by modern adjudications that a court of equity will now lay hold of the property of a dissolved corporation and administer it for the benefit of its creditors and stockholders. The obligation of contracts made while the corporation was in existence survives its dissolution, and the contracts may be enforced by a court of equity so far as to subject for their satisfaction any property possessed by the corporation at the time. In view of the equity, its property constitutes a trust-fund pledged to the payment of the debts of creditors and stockholders; and if a municipal corporation, upon the surrender or extinction in other ways of its charter, is possessed of any property, a court of equity will equally take possession of it for the benefit of the creditors of the corporation."

The property of public corporations is within the rule unless it is held for public purposes. The legislature cannot provide the capital of a bank and then frustrate the just demands of creditors by repealing the charter; and should such a measure be attempted, the court may appoint a receiver and administer the fund as a trust.<sup>2</sup> It was contended in this instance that inasmuch as the entire capital of the Bank of Arkansas came from the State treasury, and it was the only stockholder, the legislature might repeal the charter and distribute the assets as they thought proper. But the court was clearly of opinion that however true this might have been had the fund in question remained in the treasury, it yet, when invested in the bank, became charged with a

<sup>1</sup> 93 U. S. 266, 268.

<sup>2</sup> *Curran v. Arkansas*, 15 Howard, 310.

trust for creditors which survived the dissolution of the corporation, and might be enforced by a bill in equity.<sup>1</sup> The

<sup>1</sup> "It has not been attempted to maintain that such a law, operating on the property of a mere private corporation whose charter the legislature could not repeal, would be valid. But it is argued that this is a different case; that the legislature has power to destroy this corporation, and thereupon its contracts are no longer in existence and cannot be enforced against the property of the corporation, which upon the repeal of its charter reverts to the grantors of its lands and escheats, so far as it is personalty, to the State; and that if it be in the power of the State thus to destroy the remedies of creditors by repealing the charter, their rights must be considered to be entirely subject to the will of the State, and no law can impair the obligation of their contracts, because subjection to any law which may be passed belongs to the very existence of such contracts. Or, to express the same ideas in different words, that the State created and can destroy the corporation and all its contracts; and as it can thus destroy them by repealing the charter, it can modify, obstruct, and abridge the rights of creditors and the obligations of their contracts, without repealing the charter. Neither these premises nor the conclusion deduced from them can be admitted.

"This banking corporation having no other stockholder than the State, it is not doubted that the State might repeal its charter; but that the effect of such a repeal would be entirely to destroy the executory contracts of the corporation, and to withdraw its property from the just claims of its creditors, cannot be admitted. If such were the effect of a repeal of an act incorporating a bank containing no express power of repeal, it might be difficult to encounter the objection that the repealing law was invalid, as conflicting with the Constitution of the United States. This argument was pressed on this court in the case of *Mumma v. The Potomac Co.*, 8 Peters, 281, and it was met by the following explicit language:—

"We are of opinion that the dissolution of the corporation, under the acts of Virginia and Maryland, cannot in any just sense be considered, within the clause of the Constitution of the United States on this subject, an impairing of the obligation of the contracts of the company by those States, any more than the death of a private person can be said to impair the obligation of his contracts. The obligation of those contracts survives; and the creditors may enforce their claims against any property belonging to the corporation which has not passed into the hands of *bona fide* purchasers, but is still held in trust for the company or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws."

"Indeed, if it be once admitted that the property of an insolvent trading corporation while under the management of its officers is a trust-

private property of a municipal corporation is in like manner so decidedly stamped with a trust for the payment of its debts that it cannot be diverted to other uses by the legislature, and if the corporation be dissolved, the court will take possession of the fund for distribution among the creditors.<sup>1</sup>

The principle is, as we have seen, of comparatively little value in such cases because the public property of a city is not liable to execution and the main reliance of the creditors is on the power of taxation, which on the repeal of the charter reverts to the legislature and will lie idle unless they choose to exercise it.<sup>2</sup> In *Meriwether v. Garrett*,<sup>3</sup> the legislature of Tennessee passed an act repealing the charters of cities containing more than thirty-five thousand inhabitants, and providing that their property, including the sums due for taxes or any other account, should vest in the State, and their powers, except taxation, which was reserved to the legislature, devolve on commissioners appointed by the governor or chosen by the people. The effect was to leave the numerous creditors of the city of Memphis, which fell within the class defined by the statute, without any effectual means of payment. They appealed to the Supreme Court of the United States, which held that while the right remained, there was no remedy. The public property of the corporation was exempt from execution while it was in being, and so remained after the charter was repealed; and the court had neither the

fund in their hands for the benefit of creditors, it follows that a court of equity, which never allows a trust to fail for want of a trustee, would see to the execution of that trust, although by the dissolution of the corporation the legal title to its property had been changed. *Mumma v. The Potomac Co.*, 8 Peters, 281; *Wright v. Petrie*, 1 S. & M. Ch. R. 319; *Nevitt v. The Bank of Port Gibson*, 6 S. & M. 513; 1 Ed. Ch. R.; s. c. 9 Paige; *Read v. Frankford Bank*, 23 Me. R. 318. And in this point of view, the decision of this court in *Lennox et al. v. Roberts*, 2 Wheaton, 373, is applicable." *Curran v. Arkansas*, 15 Howard, 310.

<sup>1</sup> *The Park Commissioners v. Detroit*, 28 Mich. 228; *Grogan v. San Francisco*, 18 Cal. 590; *Western Saving Fund v. The City of Philadelphia*, 31 Pa. 175.

<sup>2</sup> *Meriwether v. Garrett*, 102 U. S. 472; *The Railroad Co. v. Tennessee*, 101 Id. 339.

<sup>3</sup> 102 U. S. 472.

power nor the means to levy taxes, and could not issue a mandamus to compel the commissioners to exercise an authority which the legislature had denied. The grounds for this conclusion were not assigned by the Chief-Justice, but may be found in the following extract from the judgment of Mr. Justice Field: "The right of the State to repeal the charter of Memphis cannot be questioned. Municipal corporations are mere instrumentalities of the State for the more convenient administration of local government. Their powers are such as the legislature may confer, and these may be enlarged, abridged, or entirely withdrawn at its pleasure. This is common learning, found in all adjudications on the subject of municipal bodies, and repeated by text-writers. There is no contract between the State and the public that the charter of a city shall not be at all times subject to legislative control. All persons who deal with such bodies are conclusively presumed to act upon knowledge of the power of the legislature. There is no such thing as a vested right held by any individual in the grant of legislative power to him.<sup>1</sup> By the repeal, the legislative powers previously possessed by the corporation of Memphis reverted to the State. A portion of them the State immediately vested in the new government of the taxing district, with many restrictions on the creation of indebtedness. A portion of them the State retained; it reserved to the legislature all power of taxation. It thus provided against future claims from the improvidence or recklessness of the new government. The power of the State to make this change of local government is incontrovertible. Its subsequent provision for the collection of the taxes of the corporation levied before the repeal of its charter, and the appropriation of the proceeds to the payment of its debts, remove from the measure any imputation that it was designed to enable the city to escape from its just liabilities.

<sup>1</sup> *United States v. Railroad Co.*, 17 Wallace, 322; *Commissioners v. Lucas*, Treasurer, 93 U. S. 108; *People v. Morris*, 13 Wend. (N. Y.) 325; *Philadelphia v. Fox*, 64 Pa. St. 169; *Montpelier v. East Montpelier*, 29 Vt. 12; *Angell & Ames, Corp.* (10th ed.), sect. 31; *Dill. Mun. Corp.*, sect. 30; *Cooley, Const. Lim.* 192, 193.

“But while the charter of a municipal corporation may be repealed at the pleasure of the legislature where there is no inhibition to its action in the Constitution of the State, the lawful contracts of the corporation made whilst it was in existence may be subsequently enforced against the property held by it in its own right, as hereafter described, at the time of the repeal. In this respect its position is not materially different from that of a private individual, whose property must upon his decease go to the satisfaction of his debts before those who succeed to his rights can share in its distribution.

“What, then, is the property of a municipal corporation which upon its dissolution a court of equity will lay hold of and apply to the payment of its debts? We answer, first, that it is not property held in trust for a private charity, for in such property the corporation possesses no interest for its own uses; and secondly, that it is not property held in trust for the public, for of such property the corporation is the mere agent of the State. In its streets, wharves, cemeteries, hospitals, court-houses, and other public buildings, the corporation has no proprietary rights distinct from the trust for the public. It holds them for public use, and to no other use can they be appropriated without special legislative sanction. It would be a perversion of that trust to apply them to other uses. The courts can have nothing to do with them, unless appealed to on behalf of the public to prevent their diversion from the public use. The dissolution of the charter does not divest the trust so as to subject property of this kind to a liability from which it was previously exempt. Upon the dissolution the property passes under the immediate control of the State, the agency of the corporation then ceasing.”<sup>1</sup>

It was also declared that while the judiciary might compel a municipal corporation to use its powers, including that of taxation, for the payment of its debts, the remedy could

<sup>1</sup> 2 Dillon, *Mun. Corp.*, sections 445, 446; *Shaffer v. Cadwallader*, 36 Pa. St. 126; *City of Davenport v. Peoria Marine & Fire Ins. Co.*, 17 Iowa, 276; *Askins v. Commonwealth*, 1 Duv. (Ky.) 275; *The President, etc., v. City of Indianapolis*, 12 Ind. 620. See *Eames v. Savage*, 77 Me. 212.

take effect only through the instrumentalities provided for that end by the State ; and if these ceased to exist, the court could not create others to fill the place. Hence if the city councils were dissolved, or the members evaded a mandamus by resigning before it was served, the remedy was gone, and the marshal could not be clothed with an authority which was essentially legislative and beyond the scope of the judicial branch of the government.<sup>1</sup>

It results from these decisions that the creditors of a municipal corporation are at the mercy of the legislature, which may in effect annul the obligation by repealing the charter and resolving the territory and population into the body of the State. The debts are not a charge on the citizens individually, and the power of taxation reverts to the State and cannot be exercised judicially, even to the extent of collecting the sums which have been duly assessed and remain unpaid. The private property of such bodies is generally small in amount, and their public property, including school-houses, police-stations, town-halls, hospitals, the ice-boats, engines, and other apparatus designed to keep the navigation open or extinguish fires, and even the buildings and machinery erected for supplying gas or water, is exempt from levy, for reasons of public policy which continue to operate after the charter has been repealed and all that the city possessed is vested in the State.

The question whether such a statute should not be treated as invalid in view of its manifest effect in impairing the obligation which it is incumbent on the United States to protect, does not seem to have been considered in rendering the decree. To repeal the charter of a city without making an adequate provision for the payment of its creditors, like a law abrogating all the remedies for the collection of debts, should be viewed as a fraud on the constitutional prohibition, and consequently invalid.<sup>2</sup> Were the legislature of Pennsylvania to enact that no writ of *fieri* or *levari facias* should

<sup>1</sup> Rees v. Watertown, 19 Wallace, 107, 116; Heine v. The Commissioners, Id. 655; Barkley v. Levee Commissioners, 93 U. S. 258.

<sup>2</sup> Curran v. The State of Arkansas, 15 Howard, 304.

issue or be levied without substituting other remedies, it would be the duty of the prothonotary and sheriff to proceed as regards pre-existing debts precisely as they did before the enactment, and so if the prothonotary's office were abolished with a view to giving an indefinite stay of process; and the dissolution of a municipal corporation without providing any effectual means for the discharge of its obligations, should, as it would seem, be equally inoperative.

The judgment in *Merriwether v. Garrett*<sup>1</sup> has been qualified by a decision that when the dissolution of a municipal corporation is followed by reorganization of the same territory, or so much of it as contains the larger part of its inhabitants and taxable property, into a body corporate, the intention presumably is that the obligations of the former corporation shall devolve on its successor, which may be compelled by mandamus to levy taxes for their payment, although the assets of the corporation so dissolved are vested in commissioners who are forbidden to tax and directed to treat with the creditors for the adjustment and settlement of their claims.<sup>2</sup> It is immaterial that the legislature have manifested an opposite design by taking the power to tax from the newly constituted city, or limiting its use, because the presumption is *juris et de jure*, and the constitutional prohibition cannot be evaded by such a device. If the power to tax exists and may be exercised when the debt is incurred, it cannot be repealed unless sufficient remedies remain or are substituted.<sup>3</sup> The principle is the same when two or more distinct corporations are consolidated,<sup>4</sup> or a single corporation broken into several parts; and each fragment will in the latter case be compelled to bear its share of the obligations which previously bound the whole.<sup>5</sup>

<sup>1</sup> 102 U. S. 472.

<sup>2</sup> *Mobile v. Watson*, 116 U. S. 289; *Broughton v. Pensacola*, 93 Id. 266; *The City of Olney v. Harvey*, 50 Ill. 453; *Smith v. Morse*, 2 Cal. 524.

<sup>3</sup> *Mobile v. Watson*, 116 U. S. 289, 305; *Louisiana v. Pilsbury*, 105 Id. 285; *Ralls County Court v. United States*, Id. 733.

<sup>4</sup> *Girard v. Philadelphia*, 7 Wallace, 1; *O'Connor v. Memphis*, 3 Lea, 730.

<sup>5</sup> See *Mount Pleasant v. Beckwith*, 100 U. S. 514.

Much stress was laid in *Mobile v. Watson* on the substantial identity of the original and substituted corporations in extent and population; but it is difficult to believe that the constitutional rule can be frustrated by reorganizing part and allowing the rest to sink into the mass of the State; and the true view seems to be that "neither the repeal of the charter of a municipal corporation, nor a change of its name, nor an increase or diminution of its territory or population, nor a change in its mode of government, nor all of these combined, will destroy the identity, continuity, or succession of the corporation if the people and territory reincorporated constituted an integral part of the corporation abolished. . . . The incorporators and the territory are the essential constituents of the corporation, and its rights and liabilities naturally adhere to them."<sup>1</sup>

Accordingly, when the problem which was considered in *Meriwether v. Garrett* came before the Supreme Court of Tennessee, that tribunal decided that the taxing districts into which the city of Memphis had been divided for the purposes of local government were substantially the former corporation in a different guise, and as such liable for the obligations of their predecessor, although the statute under which the controversy arose provided that they "should not pay or be liable for any debt created by said extinct corporation, nor should any of the taxes collected under the said act be used for the payment of any of the said debts."<sup>2</sup>

It is not always easy to draw the line between the property which is public and may not, and the property which is private and may, be taken in execution for the debts of a corporation; and the question may be regarded in different aspects.

There can be no doubt that everything which belongs to the State is beyond the reach of process, irrespective of the uses to which it is put; but the question is not so easily answered as regards the subordinate agencies, which, though established for governmental purposes, are yet liable to suit;

<sup>1</sup> *O'Connor v. Memphis*, 6 Lea, 730; see *Mobile v. Watson*, 116 U. S. 289, 301.

<sup>2</sup> *O'Connor v. Memphis*, 3 Lea, 730, 742.

and some of the cases tend to convey the idea that a franchise which is held or exercised as a means of gain or emolument should be equally subject to the claims of creditors, whether the holder is a private or public corporation. A railway company, or a company chartered to supply a town with gas or water, cannot plead that their powers were conferred upon them and must be exercised for a public end, as a reason why their assets should not be sequestrated, or sold under a power to that effect in a deed or mortgage; and it may be contended that there is no substantial difference between such a case and that where a like franchise is conferred on a public corporation. Under these circumstances the municipality is relatively to the matter in hand in the position of an individual, incurs the same obligations, is subject to the same liabilities, and should be judged by the same rules.<sup>1</sup> In the case last cited, the city of New York was held accountable for the loss resulting from the giving way of a dam which had been built for the purpose of supplying the inhabitants with water, although the work was performed by commissioners chosen by the legislature, and who were not subject to the control or supervision of the mayor and common council. The court held that the State might designate such persons as it thought fit to represent the city, and that the city was not, relatively to the matter in hand, a public agent, but exercising a franchise which had been conferred upon it for its own benefit and with a view to objects which did not concern the inhabitants of other localities or the community as a whole. The principle is clearly stated in the following extract from the opinion of the court as delivered by Chief-Justice Nelson: —

“The powers conferred by the several acts of the legislature authorizing the execution of this great work are not, strictly and legally speaking, conferred for the benefit of the public. The grant is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The State, in its sovereign character, has no interest in it. It owns no part of the work. The whole

<sup>1</sup> *The Western Savings Fund v. The City of Philadelphia*, 31 Pa. 175; *Bailey v. City of New York*, 3 Hill, 571.

investment under the law, and the revenue and profits to be derived therefrom, are a part of the private property of the city, as much so as the lands and houses belonging to it situate within its corporate limits.

“The argument of the defendants’ counsel confounds the powers in question with those belonging to the defendants in their character as a municipal or public body, such as are granted exclusively for public purposes to counties, cities, towns, and villages, where the corporations have, if I may so speak, no private estate or interest in the grant. As the powers in question have been conferred upon one of these public corporations, thus blending in a measure those conferred for private advantage and emolument with those already possessed for public purposes, there is some difficulty, I admit, in separating them in the mind and properly distinguishing the one class from the other, so as to distribute the responsibility attaching to the exercise of each. But the distinction is quite clear and well settled, and the process of separation practicable. To this end regard should be had not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character; but if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred.<sup>1</sup> Suppose the legislature, instead of the franchise in question, had conferred upon the defendants banking powers, or a charter for a railroad leading into the city, in the usual manner in which such powers are conferred upon private companies: could it be

<sup>1</sup> Dartmouth College v. Woodward, 4 Wheaton, 668, 672; Philips v. Bury, 1 Ld. Raym. 82 T. R. 352; Allen v. McKeen, 1 Sumner, 297; People v. Morris, 13 Wend. 331, 338; 2 Kent’s Comm. 275 (4 ed.); U. S. Bank v. Planters’ Bank, 9 Wheaton, 907; Clark v. Corporation of Washington, 12 Id. 40; Moodo’ay v. The East India Co., 1 Brown’s Ch. R. 469.

doubted that they would hold them in the same character, and be subject to the responsibilities attaching to that class of institutions? The distinction is well stated by the Master of the Rolls in *Moodalay v. The East India Co.*,<sup>1</sup> in answer to an objection made by counsel. There the plaintiff had taken a lease from the company granting him permission to supply the inhabitants of Madras with tobacco for ten years. Before the expiration of that period the company dispossessed, and granted the privilege to another. The plaintiff, preparatory to bringing an action against the company, filed a bill of discovery. One of the objections taken by the defendants was that the removal of the plaintiff was incident to their character as a sovereign power, the exercise of which could not be questioned in a bill or suit at law. The Master of the Rolls admitted that no suit would lie against a sovereign power for anything done in that capacity; but he denied that the defendants came within the rule. 'They have rights,' he observed, 'as a sovereign power; they also have duties as individuals. If they enter into bonds in India, the sums secured may be recovered here. So, in this case, as a private company they have entered into a private contract to which they must be liable.' It is upon the like distinction that municipal corporations in their private character, as owners and occupiers of lands and houses, are regarded in the same light as individual owners and occupiers, and dealt with accordingly. As such they are bound to repair bridges, highways, and churches, are liable to poor-rates, and, in a word, to the discharge of any other duty or obligation to which an individual owner would be subject.'"<sup>2</sup>

In the *Western Saving Fund v. The City of Philadelphia*, money was borrowed by the city for the erection of gas-works, which were, agreeably to the ordinance, to be under the control and management of a board of trustees elected by the city councils, and the profits were to be appropriated to the

<sup>1</sup> 1 Brown's Ch. R. 469.

<sup>2</sup> 2 Inst. 703; *Thursfield v. Jones*, Sir T. Jones, 187; *Rex v. Gardner*, Cowp. 79; *Mayor of Lynn v. Turner*, Id. 87; *Henly v. Mayor of Lyme*, 5 Bing. R. 91; 1 Bing. N. C. 222; s. c. In the House of Lords.

repayment of the loan. These stipulations were held to be a part of the contract, and the city was restrained by an injunction from taking the gas-works out of the hands of the trustees and placing them under the control of an engineer chosen by the councils. The Chief-Justice said: "The supply of gas-light is no more a duty of sovereignty than a supply of water. Both these objects may be accomplished through the agency of individuals or of a private corporation, and in very many instances they are accomplished by those means. If this power is granted to a borough or city, it is an especial private franchise, made as well for the private advantage and emolument of the city as for the public good. The whole investment is the private property of the city, as much so as the lands and houses belonging to it. Blending the two powers in one grant does not destroy the clear and well-settled distinction, and the process of separation is not rendered impossible by the confusion."

In one of the above instances the question was as to the liability of the corporation for negligence in the construction of a public work, and in the other whether such property could be specifically pledged or mortgaged as security for a loan; and it does not follow that a city will, by selling gas or water instead of supplying them free of charge, render the works in which they are produced liable to sequestration for its debts in the absence of a contract to that effect. In *New Orleans v. Morris*<sup>1</sup> the works which supplied the city with water were conveyed to a company which had been incorporated for the purpose of enlarging and managing them, and the stock of the company taken in payment, with a stipulation that the shares should be appropriated to the payment of the bonds which had been issued by the city when the works were built; and the court held that they were so far public property that they could not have been taken in execution while they belonged to the municipality, and were equally exempt in the hands of the company to whom they had been transferred.

Whether the debts of a city may or may not be virtually

<sup>1</sup> 105 U. S. 600.

expunged by repealing its charter, it is well settled that the legislature has no such power while the corporation is in being, and can neither abrogate the power of taxation nor exonerate the city from using it as a means of providing for the just demands of its creditors. A mandamus may consequently be issued to compel the levy of the requisite amount by taxation, precisely as if the disabling statute had not been enacted.<sup>1</sup> It was accordingly decided in *Von Hoffman v. The City of Quincy* that where a municipal corporation is authorized by statute to issue bonds and exercise the power of taxation as a means of payment, and third persons have given value for the bonds in reliance on the authority thus conferred, there is a contract both on the part of the State and corporation within the meaning of the Constitution, and the power to tax cannot be withdrawn so long as the debt remains unpaid. A statute which repeals or impairs the right and duty of the city to lay taxes for the purpose of meeting its obligations, is invalid so far as it affects bonds previously sold; and if the councils fail to perform their duty in this regard, they may be compelled by a mandamus. "It is clear," said Swayne, J., "that where a State has authorized a municipal corporation to contract and exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The State and the corporation, in such cases, are equally bound. The power becomes a trust which the donor cannot annul, and which the donee is bound to execute, and neither the State nor the corporation can any more impair the obligation of the contract in this way than in any other."<sup>2</sup> . . . The laws requiring taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force

<sup>1</sup> *Wolff v. New Orleans*, 103 U. S. 358; *Louisiana v. Pilsbury*, 105 Id. 278; *Von Hoffman v. The City of Quincy*, 4 Wallace, 554; *Butz v. Muscatine*, 8 Id. 575; *Edwards v. Kearzey*, 96 U. S. 595; *Ralls County Court v. United States*, 105 Id. 733; *Mobile v. Watson*, 116 Id. 289, 305; *Tennessee v. Sneed*, 96 Id. 69; *Soutter v. Madison*, 15 Wis. 30; *Williams's Appeal*, 72 Pa. 214; *Seibert v. Lewis*, 122 U. S. 284.

<sup>2</sup> *People v. Bell*, 10 Cal. 570; *Dominie v. Sayre*, 3 Sanford, 555.

for all the purposes of this case. The act of 1863 is, as far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes in all respects as if that act had not been passed. A different result would leave nothing of the contract but an abstract right of no practical value, and render the protection of the Constitution a shadow and a delusion."

The remedy is nevertheless one which may be so easily frustrated as materially to lessen its practical value, for if the persons who ought to levy the tax are dismissed or their authority is revoked, or should they resign, and no other person can be found who is willing to fill the place, the writ of mandamus will necessarily fail of effect, because the power of taxation is legislative, and cannot be exercised by the judiciary or save through the instrumentalities specifically constituted for that end by the State.<sup>1</sup> In the case last cited, Harlan, J., dissented, on the ground that the judgment was a confession of helplessness which he for one was unwilling to make; but the case is simply an instance of the often-verified truth that the tribunals are powerless where the great body of a community are resolutely bent on frustrating the laws.

It results from the same principle that when commissioners who have been legislatively empowered to execute a public work on behalf of a municipal corporation, enter into a contract for the attainment of that end, the city is as much bound as if it had affixed its seal, and the obligation cannot be impaired or abrogated by dissolving the commission or relieving the municipality from the duty of providing the means for its fulfilment. It is immaterial as regards the application of this rule whether the change is made by an act of assembly or by an amendment of the State Constitution, because the Constitution of the United States is not less binding on the people of the State as an organic whole than on the legislature.<sup>2</sup> In the case last cited, Mitchell, J., said:

<sup>1</sup> *Barkley v. The Levee Commissioners*, 93 U. S. 258; *Thompson v. Allen Co.*, 115 Id. 550; see *ante*, p. 638.

<sup>2</sup> See *Perkins v. Slack*, 86 Pa. 276; *Struthers v. The City of Philadelphia*, 12 Phila. 268; 4 Weekly Notes, 379.

"A municipal corporation is the mere agent and servant of the legislature. Its charter is not a contract, and its power and privileges may be taken away in whole or in part, or delegated to a commission or other body, at any time by the mere exercise of the legislative will. That this is the general rule of constitutional law, and that it was the unquestionable rule in this State when this building commission was created, is conceded by the counsel for the city in the present case. The constitutionality of this very building commission has been several times affirmed by the Supreme Court.<sup>1</sup> The commission, therefore, being a legal and constitutional body, invested with certain portions of the municipal powers, its contracts, within the scope of those powers, are as valid and binding upon the city of Philadelphia as if they had been made by the mayor or councils in the exercise of their general authority. The supreme control of the legislature over municipal corporations, however, as I have above stated it, no longer exists in Pennsylvania since the present Constitution went into effect. By Art. III., Sect. 20, the legislature is prohibited from delegating to any special commission the power to make, supervise, or interfere with any municipal improvement, or to levy taxes or perform any municipal function; and there are various other provisions tending to confirm and make exclusive the power of city councils over the whole subject of municipal taxation and expenditure. Whatever may be the effect of the Constitution on the future acts of the commission, it is clear that it cannot in any way affect a liability already incurred under a contract valid when made. The Constitution of the United States prohibits any State from passing any law impairing the obligation of a contract, and the Supreme Court of the United States has decided that this prohibition is as effective against a constitutional amendment as against a legislative statute. By neither mode can a State impair the obligation of a contract valid when made."<sup>2</sup>

<sup>1</sup> *Baird v. Rice*, 63 Pa. 489; *Wheeler et al. v. Rice*, 3 Weekly Notes, 333; *Lea v. Bumm*, Id. 335.

<sup>2</sup> *Gunn v. Barry*, 15 Wallace, 610.

The grant of an office, like the charter of a public corporation, is a mere delegation of authority, and revocable at pleasure by the State. The law creating the office may therefore be repealed, or the salary of the incumbent reduced during his tenure without impairing the obligation of a contract.<sup>1</sup> The rule was so held in *Connor v. The City of New York*,<sup>2</sup> where Ruggles, J., said that in this country public offices are not incorporeal hereditaments, nor have they the character or quality of grants; they are agencies created for the benefit of the public, which may at any time be controlled or abolished by the legislature. So in *Knoup v. The Piqua Bank*,<sup>3</sup> a public agent was described as being simply a servant or trustee having no ownership in the duties which he has been appointed to perform, or the compensation which he is to receive for his services. An ordinance of the City Councils reducing the salary of the mayor of Philadelphia after the commencement of his term of office, was accordingly held valid in *the Commonwealth v. Bacon*.<sup>4</sup> Duncan, J., said: "The broad ground taken on the part of the mayor was, that his salary could not legally be diminished after his duties had begun. It had been endeavored to support this position both on the general principles applicable to contracts, and because the change was forbidden by the Constitution. Neither argument was good. The case was not that of a hiring for a year, because it was not obligatory on the mayor to serve out the year. The services rendered by public officers do not partake of the nature of contracts. The salary of the governor and judges of the Supreme Court and of the presidents of the courts of Common Pleas could not, agreeably to the Constitution of Pennsylvania, be diminished while they remained in office. The compensation of all other officers was left to the discretion of the legislature."<sup>5</sup>

<sup>1</sup> *Koontz v. Franklin Co.*, 76 Pa. 154; *The State v. Horman*, 11 Mo. App. 43; *Donahue v. Rolls County*, 100 Ill. 94; *Commonwealth v. Bailey*, 81 Ky. 395; *Farwell v. Rockland*, 62 Me. 296; *Warner v. The People*, 7 Hill, 81.

<sup>2</sup> 1 Selden, 285.

<sup>3</sup> 1 Ohio St. 603, 616.

<sup>4</sup> 6 S. & R. 322.

<sup>5</sup> See 4 *Wheaton*, 418, 593; 6 *Howard*, 507, 548; *Butler v. Pennsylvania*, 10 Id. 402.

A State is nevertheless as much bound by its contracts as an individual, and cannot engage a servant for a definite period and then rely on a repeal of the statute under which the agreement was made, as a justification for dismissing him before the appointed time.<sup>1</sup> An office is an employment; but it does not follow that every one whom the State employs is a bare mandatary who may be turned adrift at pleasure.<sup>2</sup> In *Hall v. Wisconsin* the legislature provided for a geological survey of the State, and authorized the governor to carry it into effect by engaging the services of three commissioners, who were to serve for two years at the rate of four thousand dollars per annum, and not to be removable except for incompetency or neglect. The plaintiff was employed under this statute, and it was held that there was a contract that bound both parties, and could not be rescinded without mutual consent. As the State could not have dismissed the plaintiff while the statute was in force, so they could not attain the same end by repealing the statute, and thus putting an end to the business for which he had been engaged.

Although the grant of a license for a valuable consideration is presumably irrevocable, or, in other words, a contract that the grantor will not recall the power which he has conferred, the circumstances may nevertheless exclude this inference and show that the grant is subject to an implied condition which may render it inoperative. The grant of a pew in perpetuity, or of a burial-lot in a cemetery attached to a church, is within this principle, and simply entitles the grantee to a usufructuary right so long as the church is employed as a place for religious worship, or the cemetery can properly be used for interments. If the edifice becomes useless by dilapidation, or is destroyed by fire or other casualty, the right of the pew-owner is gone; and it has been declared that a "pew right" is not of such a character as to preclude a sale of the church edifice either by private contract or by

<sup>1</sup> *United States v. Hartwell*, 6 Wallace, 385; *Hall v. Wisconsin*, 103 U. S. 5; see *King v. Hunter*, 65 N. C. 603; *Van v. Pepkin*, 77 Id. 408.

<sup>2</sup> *United States v. Maurice*, 2 Brock, 96.

judicial process.<sup>1</sup> So the purchase of a church vault, or of the right of sepulture belonging to a religious society, does not, agreeably to many authorities, give a title to the heirs or executors of the buyer, or preclude the sale of the premises and the removal of the remains with the decency and respect for the feelings of the survivors which humanity and the common law require.<sup>2</sup>

Whatever the rule may be between a cemetery company and the persons to whom they have sold burial-lots, there can be no doubt that the State may, by virtue of the police power, forbid interment within the limits of a city or in any place where it will be injurious to the public health, and that a law passed for that end will be obligatory both on the company and its grantees. In *The Brick Church v. New York*,<sup>3</sup> the city of New York conveyed a piece of ground to a religious society for burial purposes, with a covenant for quiet enjoyment; and an act prohibiting future interments was held to be a defence to a suit for the breach of the covenant. The act rescinded without impairing the obligation of the contract, because it was a legitimate exercise of the police power, and the covenantor could not be bound to do what the law prohibited. The case of *Coates v. The Mayor of New York*<sup>4</sup> is to the same effect; and it has been held to follow that the legislature may proceed a step further, and not only vacate the burying ground as such, and order the removal of the bodies, but authorize a sale of the premises, and direct that the proceeds shall, after compensating the holders of the lots, be distributed among the stockholders or other persons owning or entitled to the fee.<sup>5</sup>

<sup>1</sup> *The Church v. Wells*, 24 Pa. 249; *Kincaid's Appeal*, 66 Pa. 411.

<sup>2</sup> See *Kincaid's Appeal*, 66 Pa. 411; *Richards v. The Church*, 32 Barb. 42; *Windt v. The Reformed Church*, 4 Sanford Ch. 471; *The King v. Lind*, 2 Term, 733.

<sup>3</sup> 5 Cowen, 538.

<sup>4</sup> 7 Cowen, 585.

<sup>5</sup> *Kincaid's Appeal*, 66 Pa. 411.









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